

CONTRACT FORMATION

Authority

No Good Deed Goes Unpunished

A black-letter rule of government contracting provides that only an agent with actual authority may bind the government to a contract.¹ A recent Armed Services Board of Contract Appeals (ASBCA) case demonstrates how strictly the ASBCA applies this rule.² In *Portable Water Supply Systems Co.* (PWSS), the ASBCA denied relief to a contractor who entered into an agreement with a senior official from the Agency for International Development (AID) to provide desperately needed drinking water for refugees in the wake of the humanitarian crisis that struck Central Africa in 1994.³ Although opinions differed significantly concerning the various understandings the parties reached, it was clear that AID procured the services of PWSS with the knowledge and consent of various high-level officials.⁴

In July 1994, the media was focusing the world's attention on the Rwandan refugee crisis and the potential cholera epidemic facing refugees in Goma, Zaire.⁵ At this time, PWSS was a recently formed company that specialized in providing water supply equipment and emergency water supply systems. In the wake of developing events, the president of PWSS, Frank T. Blackburn, contacted Senator Dianne Feinstein's Chief of Staff, Hadley Roth. Blackburn informed Roth that PWSS possessed the means and expertise to provide a clean water supply for Goma, and thus prevent a potentially massive cholera epi-

demio.⁶ Following the receipt of this information, Roth talked to Senator Feinstein, who apparently called President Clinton. The Senator's office then contacted Brian Atwood, the Administrator of AID, and eventually Gerard Bradford, the Assistant Director for Operation Support, Office of Foreign Disaster Assistance (OFDA), who initiated negotiations to secure the services of PWSS.⁷

During the negotiations, but before deploying to Zaire, the parties preliminarily agreed the government would reimburse PWSS under a standing emergency equipment rental contract PWSS had with the U.S. Forest Service.⁸ The parties never agreed to a new contract before the government mobilized PWSS and airlifted the company's personnel and equipment to Goma.⁹ Upon arrival, PWSS encountered an environment where bodies literally lined the streets, and physical security was of paramount concern. The State Department tasked U.S. military personnel to provide security for PWSS's operation. Within hours of its arrival, PWSS was providing potable water, and within days it was producing 3000 gallons per hour.¹⁰

As PWSS proceeded with its performance, Bradford realized that the OFDA needed to formalize a contract for PWSS's services.¹¹ The authorities gained control of the cholera epidemic during the negotiations, and U.S. military officials informed Blackburn and the OFDA officials that the military would soon pull out of the area.¹² As the military's departure neared, Blackburn received a facsimile copy of the proposed contract from the OFDA; Blackburn signed the contract on 22 August 1994. The contract did not allow for any profit on equipment PWSS sold to the government, or for other expenses

1. See *Fed. Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); see also Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 132 [hereinafter *2001 Year in Review*].

2. ASBCA No. 49813, 02-1 BCA ¶ 31,805.

3. *Id.* at 157,121.

4. *Id.* at 157,110-11.

5. Although Zaire is now known as the Democratic Republic of Congo, the ASBCA used the term Zaire since that was the name in use when the events of the case took place. *Id.* at 157,121.

6. *Id.* at 157,110.

7. *Id.* at 157,110-11.

8. *Id.* At the hearing, Bradford testified that during the initial stages of negotiations with PWSS, he thought PWSS was a volunteer entity, and that PWSS was simply seeking transportation support and reimbursement for direct costs. Blackburn testified, however, that he informed Bradford that PWSS was "not a nonprofit organization." *Id.* at 157,112. Blackburn also testified that he had reservations about using the Forest Service contract as a mechanism for payment, since the contract did not cover water purification. Due to the urgency of the situation, however, he felt that he should resolve these issues later. *Id.*

9. PWSS, 02-1 BCA ¶ 31,805, at 157,112-13.

10. *Id.* at 157,113.

11. On 21 August 1994, the OFDA tasked Georgia Beans with negotiating a contract between the OFDA and PWSS. She contacted Eric Doeber, PWSS's Director of Marketing, and asked PWSS to provide cost figures for various line items. Ms. Beans used this data to draft the contract that Blackburn subsequently signed on 22 August 1994. *Id.* at 155,115.

12. *Id.* at 157,115.

for which Blackburn later sought recovery. Blackburn testified that he felt he had no choice but to sign the contract because he could not acquire physical security or other goods and services from local merchants unless he could demonstrate that he had the money to pay them.¹³

Several months after the completion of contract performance, PWSS invoiced the AID. The invoice, in the amount of \$186,979, included costs for the operation of eight water purification units “as required by agreement with Gerald Bradford.”¹⁴ On 30 April 1996, the contracting officer denied the claim. On 1 May 1996, PWSS appealed the decision to the ASBCA.¹⁵ At the hearing, PWSS sought recovery for equipment expenses under the Forest Service contract, as opposed to the contract executed on 22 July 1994. PWSS reasoned that during the negotiation phase, Bradford and Blackburn intended to use that contract as the means of payment. In support, PWSS argued that “even [when] not formally warranted, contracting officers have the authority to bind the government and permit [sic] the government to a financial obligation premised on the circumstances and exigencies of the matter at hand.”¹⁶

The ASBCA first examined whether the parties had anything remotely resembling a binding contract before PWSS’s departure for Goma. The board held that the parties did not establish mutual assent because they attached materially different meanings to each other’s manifestations. As such, even if Bradford had actual authority to bind the government, the parties never achieved the requisite meeting of the minds to form a contract.¹⁷ The board next examined whether Bradford had the authority to bind the government to a contract. Citing *Federal Crop Insurance Co. v. Merrill*,¹⁸ the board applied the age-old rule that only those who have actual authority can bind the government.¹⁹ Although Bradford did have a warrant for small purchases under \$25,000, the board concluded that the appel-

lant failed to show that Bradford or any other government employee involved had an express delegation of authority to enter into a contract of the sort contemplated by Blackburn.²⁰

The lesson of *PWSS* is that if you want to do good deeds and save the world (albeit for a reasonable profit), get your contractual terms sorted out before you head to the field.

Promises, Promises . . .

If you are in the Witness Security Program (WSP) and the government has promised you the moon and the stars for your cooperation, you may have problems collecting. In *Austin v. United States*,²¹ the Court of Federal Claims (COFC) recently ruled that a witness under WSP protection could not collect against the government for alleged promises regarding child visitation rights, move-related expenses, and payment of a monthly stipend, notwithstanding the alleged existence of a written memorandum of understanding (MOU) documenting the promises.²²

In *Austin*, the plaintiff provided grand jury testimony that resulted in the conviction of several organized crime members. In exchange for Austin’s services, the United States Marshall Service (USMS) promised to protect Austin and his family, and entered Austin and his wife into the WSP in November 1994. Austin alleged that when he entered into the WSP, representatives of the USMS made several additional promises. Specifically, Austin alleged that the USMS promised that he would be entitled to child visitation rights at government expense, that the government would reimburse Austin for damage to his personal property resulting from his move to a new location, and that the government would pay Austin’s living expenses and a monthly stipend. Austin alleged that these promises were part

13. *Id.* at 157,116.

14. *Id.* at 157,117-18.

15. *Id.* at 157,118.

16. *Id.* The appellant apparently meant to say “commit” instead of “permit.” The appellant also argued that he was entitled to recover his expenses because when he signed the 22 July 1994 contract, he was under duress as a result of the pending withdrawal of U.S. military forces. *Id.*

17. *Id.* at 157,119.

18. 332 U.S. 380 (1947).

19. *PWSS*, 02-1 BCA ¶ 31,805, at 157,119.

20. *Id.* at 157,119-20. The final issue the board examined was duress. Applying the standard from *Home Entm’t, Inc.*, ASBCA No. 50791, 99-2 BCA ¶ 30,550, at 150,862, the board stated that for PWSS to show duress, it would need to establish that it involuntarily accepted the terms of the contract, that circumstances permitted no other reasonable alternative, and that the circumstances were the result of the coercive acts of the government. *PWSS*, 02-1 BCA ¶ 31,805, at 157,120. In this case, PWSS failed to convince the board that the facts met this standard. Specifically, the board noted that much of the delay in finalizing the contract was due to Blackburn’s insistence that only he—and not company officials at the PWSS home office—could sign the contract. Further, the decision of the U.S. military to pull out of Goma was not, in the eyes of the board, a coercive act by government officials. *Id.* at 157,120.

21. 51 Fed. Cl. 718 (2002).

22. *Id.*

of the WSP package, and that a government representative put the promises in writing in the form of a memorandum of understanding (MOU). At the motion hearing, however, Austin could not produce a copy of the MOU.²³

The COFC granted the government's motion to dismiss and observed that the statutory authority for the WSP provided that "[t]he United States and its officers and employees shall not be

subject to any civil liability on account of any decision to provide or not provide protection under this chapter."²⁴ As such, representatives of the USMS possessed no authority to bind the government beyond the scope of the statute. The COFC reasoned that even if Austin could produce the written agreement, he still could not establish that the government had a contractual or statutory obligation under the WSP.²⁵ Major Dorn.

23. *Id.* at 719.

24. 18 U.S.C. § 3521(a)(3) (2000).

25. *Austin*, 51 Fed. Cl. at 720-21.

Competition

Last year's *Year in Review* introduced its discussion of competition with testimony from then-nominee for Administrator of the Office of Federal Procurement Policy (OFPP), Angela Styles.¹ Last year, Ms. Styles expressed concern about the impact of procurement reform on traditional government procurement objectives: competition, due process, and transparency.² The tension between competition and acquisition reform continues to play out in litigation, legislation,³ and academic discourse. In August 2002, at the invitation of Ms. Styles, General Services Board of Contract Appeals (GSBCA) Chairman Stephen Daniels spoke at the OFPP lecture series.⁴ Daniels harshly criticized the acquisition reform movement. According to Mr. Daniels:

Although some parts of CICA [Competition in Contracting Act of 1984] remain on the statute books, the guts have been ripped out of it. Openness, fairness, economy, and accountability have been replaced as guiding principles by speed and ease of contracting. Where the interests of taxpayers were once supreme, now the convenience of agency program managers is most important. Full and open competition has become a slogan, not a standard; agencies have to implement it only "in a manner that is consistent with the

need to efficiently fulfill the Government's requirements."⁵

His comments garnered equally stinging replies from reform advocates.⁶ The decisions in this section represent some of the many battlegrounds upon which the competition debate is fought.

Unduly Restrictive Specifications: Are You Just Talking Trash?

During the past fiscal year, the Comptroller General considered nine protests⁷ alleging unduly restrictive government specifications in violation of the Competition in Contracting Act of 1984 (CICA).⁸ The GAO denied six of the protests, generally finding that the government agencies had adequately justified their needs.

In *Vantex Service Corp.*,⁹ Vantex challenged the Army's bundling of portable latrine services with waste removal services. Vantex alleged that combining the two types of services unduly restricted competition and was not necessary to meet the government's needs. The GAO agreed with this argument.¹⁰

The *Vantex* invitation for bids (IFB) contemplated the award of one or more contracts for rental and servicing of portable latrines at Fort Bragg; North Carolina, Fort Drum, New York; and Fort Campbell, Kentucky; and for waste removal services at Fort Campbell.¹¹ The IFB divided the work into four sched-

1. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 3-4.

2. *Id.* at 4.

3. See *supra* Part II.C, *Contract Types* (discussing the new regulatory requirements governing competition in Multiple Award Schedules and Government-wide Agency Contracts (GWACS)).

4. See GSBCA's Daniels Tells OFPP Forum That Reforms Put Efficiency Before Fundamentals, 78 BNA FED. CONT. REP. 8, at 236 (Aug. 20, 2002); *Recent Procurement Changes Have "Gutted" CICA*, GSBCA Chairman Says, 44 GOV'T CONTRACTOR 31 (Aug. 21, 2002).

5. Stephen M. Daniels, Chairman, General Services Board of Contract Appeals, Address to the Office of Federal Procurement Policy (Aug. 15, 2002), available at <http://www.pogo.org/m/cp/cp-daniels2002.pdf>.

6. Shane Harris, *Procurement Reform Critique Angers Executives*, GovExec.Com (Sept. 6, 2002), available at <http://www.govexec.com/dailyfed/0902/090602h1.htm>. In the article, an anonymous executive called the speech "offensive." *Id.* Steven Kelman, a former OFPP Administrator, was quoted as saying, "Daniels was a key figure in one of the most dysfunctional management systems ever imposed on the federal government." *Id.*

7. C. Lawrence Constr. Co., Comp. Gen. B-290709, Sept. 20, 2002, 2002 CPD ¶ 165; Vantex Serv. Corp., Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131; Military Agency Servs. Pty. Ltd., Comp. Gen. B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130; Instrument Control Serv., Inc., Comp. Gen. B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66; Mark Dunning Indust., Inc., Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46; Flowlogic, Comp. Gen. B-289173, Jan. 22, 2002, 2002 CPD ¶ 22; Keystone Ship Berthing, Inc., Comp. Gen. B-289233, Jan. 10, 2002, 2002 CPD ¶ 19; C. Lawrence Constr. Co., Comp. Gen. B-289341, Jan. 8, 2002, 2002 CPD ¶ 17; Apex Support Servs., Inc., Comp. Gen. B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202.

8. 10 U.S.C. § 2305(a)(1)(B)(ii) (2000) ("Specifications will 'include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as authorized by law.'"); 41 U.S.C. § 253a(a)(2)(B) (2000); see also GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 11.002(a)(1) (July 2002) [hereinafter FAR] ("[A]gencies shall . . . [o]nly include restrictive provisions or conditions to the extent necessary to satisfy the needs of the agency or as authorized by law.").

9. Comp. Gen. B-290415, Aug. 15, 2002, 2002 CPD ¶ 131.

10. *Vantex*, 2002 CPD ¶ 131, at 1.

11. *Id.* at 1-2.

ules, one for each facility and one that included all three locations. The Fort Campbell schedule covered both the latrine services and the waste removal services,¹² while the Fort Bragg and Fort Drum schedules included latrine services only.¹³

Vantex noted that the two service types fell under different North American Industrial Classification (NAICS) Codes and alleged that providers of latrine services would not compete for waste removal services “and vice versa.”¹⁴ The protestor was aware of no other military installation that bundled these requirements and observed that prior solicitations for the combined services at Fort Campbell produced few bidders.¹⁵

The Army’s justification for combining the two requirements boiled down to “administrative convenience.”¹⁶ According to the Army, a single solicitation “was cost efficient and reduced our administrative burden. As a result, Fort Campbell could obtain needed similar services utilizing one contracting officer, one contract specialist, and one contracting officer’s representative.”¹⁷

The GAO questioned the Army’s unsupported assertion that combining the services was more cost efficient, noting that “restricting competition is presumed to raise, not lower, the cost that the government will pay.”¹⁸ In light of the historical dearth of competition for the combined solicitation and indications that additional companies would have bid on separate requirements, the GAO expressed concern that bundling in this case caused “unnecessarily high prices.”¹⁹

Ultimately, the GAO clearly placed the burden on the government to justify specifications that limit competition: “the issue is not whether there are any potential offerors who can surmount barriers to competition, but rather whether the barriers themselves—in this case, the bundling—are required to meet the government’s needs.”²⁰ In *Vantex*, the Army failed to show that combining the portable latrine services with waste removal services was necessary to meet its needs.²¹

In *C. Lawrence Construction Co.*,²² the GAO rejected the Department of Labor’s use of a brand name specification in a construction solicitation.²³ One specification in this IFB for educational and vocational buildings required signs to be manufactured by “ASI Sign Systems . . . [or a] pre-approved manufacturer with an equal product.”²⁴ At the time of bid opening, no other manufacturer had been “pre-approved.”²⁵

The IFB contained conflicting provisions concerning whether the solicitation allowed substitutions. The IFB provided, “Where specifications name only a single product or manufacturer, provide the product indicated. No substitutions will be permitted.”²⁶ Another provision, however, stated, “References in the specifications to any article, device . . . by name, make or catalog number, shall be interpreted as establishing a standard of quality, and not as limiting competition. The Contractor may make substitutions equal to the items specified if approved prior to bid opening”²⁷ Lawrence interpreted the solicitation as requiring use of ASI signs. Thus, the protestor argued that the sign specification improperly restricted compe-

12. *Id.* at 2. Waste removal services included pumping and cleaning grease pits, septic tanks and concrete pit latrines and removing, and cleaning and reinstalling sump pumps. *Id.*

13. *Id.* at 1-2.

14. *Id.* at 2.

15. *Id.* at 2-3. Even the Army’s market research revealed that numerous businesses were capable of competing “for the waste removal services, but chose not to compete” due to the requirement to also provide portable latrine services. *Id.*

16. *Id.* at 4.

17. *Id.*

18. *Id.*

19. *Id.* at 5.

20. *Id.*

21. *Id.* at 6. The GAO recommended that the Army resolicit the services without bundling the requirements. *Id.*

22. Comp. Gen. B-290709, Sept. 20, 2002, 2002 CPD ¶ 165.

23. *Id.* Brand-name specifications were also at issue in *Elementar Americas, Inc.*, a simplified acquisition solicitation for commercial items, discussed in the section of this issue entitled *Simplified Acquisitions*. *Elementar Americas*, Comp. Gen. B-289115, Jan. 11, 2002, 2002 CPD ¶ 20. See *supra* Part II.F (discussing “simplified acquisitions issues”).

24. *C. Lawrence Constr. Co.*, Comp. Gen. B-290709, Sept. 20, 2002, 2002 CPD ¶ 165, at 2.

25. *Id.* at 4.

26. *Id.* at 2.

tition because it required “the contractor to furnish ASI signs despite the fact that equivalent signs manufactured by other companies will also meet the agency’s needs.”²⁸ The GAO found that the provisions were “at best ambiguous and could reasonably have been interpreted” as requiring bidders to furnish only ASI signs. The agency did not argue that only ASI signs would meet its needs.²⁹ The Comptroller General described the specification as follows:

[The brand-name specification is] contrary to the statutory requirement that solicitations include specifications that permit full and open competition and contain restrictive provisions only to the extent necessary to satisfy the needs of the agency . . . and potentially prejudicial to bidders who reasonably believed themselves precluded from using lower-priced quotations from other sign manufacturers . . . [and] it apparently . . . not what the agency intended.³⁰

The GAO sustained the protest.³¹

None of the cases in which the GAO denied allegations of unduly restricted competition broke new ground. In *Military Agency Services Property Ltd. (MAS)*,³² the GAO re-affirmed that it will give substantial deference to agency specifications designed to promote human safety. MAS challenged a Request

for Quotations (RFQ) for picket boat services.³³ The protestor alleged that the requirements “exceeded the agency’s legitimate needs,” but included only one specific example.³⁴ MAS argued that no boat afloat could meet the requirement that the picket boat be “free . . . of exposed wires and connections.”³⁵ Despite this unsupported assertion, the GAO found that MAS had not shown that the Navy’s requirement was unreasonable.³⁶ The nature of the procurement clearly weighed in the government’s favor. As the GAO stated, “[W]hen a requirement relates to human safety, the agency has the discretion to define solicitation requirements to achieve not just reasonable results, but the highest possible reliability and effectiveness.”³⁷

In cases challenging unduly restrictive specifications, the GAO examines whether the specification is reasonably necessary to meet the agency’s needs.³⁸ The GAO, however, is reticent to question those needs, even if the needs appear “irrational.” In *Mark Dunning Industries, Inc.*,³⁹ the protestor challenged Fort Campbell’s request for proposals (RFP) for an “individual household trash weighing system”⁴⁰—high-technology garbage trucks and containers. The RFP required trash trucks “equipped with an on-board computerized weighing system.”⁴¹ Each trash container had to include “indicating elements and radio frequency transponder devices.”⁴² The system would weigh each household’s trash and recycling to support the agency’s goal to reduce the amount of waste disposed in landfills.⁴³ The protestor asserted that weighing the total trash disposed of would be much more efficient and less costly than

27. *Id.* at 3.

28. *Id.* at 4.

29. *Id.* at 8.

30. *Id.* (citations omitted).

31. *Id.* at 6. The final sustained allegation of unduly restricted competition involved the unreasonable imposition of bonding requirements. *Apex Support Servs., Inc.*, Comp. Gen. Dec. B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202. For a discussion of this case, see *supra*, Part IV.F, *Bonds, Sureties, and Insurance*.

32. *Military Agency Servs. Pty. Ltd.*, B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130.

33. *Id.* at 2. Picket boats protect ships “from all waterborne threats by screening all incoming waterborne craft prior to arrival alongside a ship.” *Id.* at 2 n.1.

34. *Id.* at 4.

35. *Id.*

36. *Id.* at 5.

37. *Id.* at 4-5.

38. See, e.g., *Mark Dunning Indus., Inc.*, Comp. Gen. B-289378, Feb. 27, 2002, 2002 CPD ¶ 46, 3-4.

39. *Id.*

40. *Id.* at 1.

41. *Id.* at 2.

42. *Id.*

43. *Id.*

weighing each household's trash. Fort Campbell decided that the best way to accomplish its goal was to weigh individual household trash.⁴⁴

The GAO did not dispute the protestor's belief that the agency's decision was irrational, but the protestor's disagreement with the agency's needs did not provide a basis for protest. Because the agency's requirement was "equally available to all potential competitors," there was no undue restriction on competition.⁴⁵ Given the agency's discretion to determine its own needs, the GAO will not sustain a protest solely because the acquisition may be costly, inefficient, and ineffective.⁴⁶

In *C. Lawrence Construction Co. (C. Lawrence)*,⁴⁷ the GAO found that past performance evaluation criteria are not unnecessarily restrictive if the criteria are reasonably related to the agency's minimum needs.⁴⁸ The *C. Lawrence* construction RFP⁴⁹ provided for a "best value" source selection in which past performance would be evaluated equally to price or other considerations.⁵⁰ The Army Corps of Engineers (COE) required each proposal to list five to ten relevant contracts performed within the last five years and to provide a performance survey completed by the project owner of each relevant contract. "Relevant" contracts were those for projects similar in scope and magnitude to the project under solicitation and included, but were not limited to, "aircraft hangars and/or light industrial type facilities which may include pre-engineered metal building frame, paving and utility work; and within the range of \$5,000,000 to \$10,000,000."⁵¹

C. Lawrence alleged that requiring at least five contracts of \$5 million or more would exclude all small, emerging businesses.⁵² The COE responded that it needed five projects to establish "a better 'comfort zone' in which it can determine a contractor's overall performance and performance trends."⁵³ The project under solicitation was also likely to be closer to the high end of the dollar range.⁵⁴ The protestor did not specifically refute the agency's rationale, but argued that these past performance requirements would exclude it and all small emerging businesses from competing. The GAO, unimpressed with this reasoning, denied the protest, holding that "the fact that a particular prospective offeror is unable to compete under a solicitation that reflects the agency's needs does not establish that the solicitation is unduly restrictive."⁵⁵

The GAO denied three other protests alleging unduly restrictive specifications. In *Instrument Control Service*,⁵⁶ the protestors contended that a five-work-day turnaround time to calibrate test, measurement, and diagnostic equipment at an Air Force Precision Measurement Equipment Laboratory was unnecessary and unattainable.⁵⁷ The Air Force explained, in some detail, how the five-day requirement was necessary to perform programmed maintenance in support of airlift missions.⁵⁸ Historical records, including one protestor's average turnaround time under a previous contract, showed that the time period was attainable.⁵⁹

In *Flowlogic*,⁶⁰ the COE issued an RFQ on 2 August 2001, using simplified acquisition procedures.⁶¹ The RFQ called for

44. *Id.* at 3.

45. *Id.* at 4.

46. *Id.* The protestor also challenged the requirement that the contractor had to use one particular landfill—the landfill geographically closest to Fort Campbell. Mark Dunning Industries argued that the agency had no basis for this requirement and that the requirement eliminated competitive pressure to keep rates low. *Id.* The GAO found that the need to respond quickly to discoveries of unexploded ordnance justified the mandatory use of the closest landfill. Further, because all offerors had access to the landfill, the agency's requirement did not restrict competition. *Id.* at 4-5.

47. Comp. Gen. B-289341, Jan. 8, 2002, 2002 CPD ¶ 17.

48. *Id.* at 1.

49. *Id.* at 1-2. The RFP contemplated construction of an F-22 squadron maintenance hangar at Tyndall Air Force Base, Florida, costing between \$5 and \$10 million. *Id.*

50. *Id.*

51. *Id.* at 2.

52. *Id.*

53. *Id.* at 3.

54. *Id.*

55. *Id.* at 4.

56. *Instrument Control Serv., Inc.*, Comp. Gen. B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66.

57. *Id.* at 1.

58. *Id.* at 5-6.

a commercial software package to administer performance reviews and organizational surveys. The RFQ required software delivery by 5 September and software training no later than 12 September.⁶² Installation and training in September were crucial because certain employees had rating periods ending on 30 September.⁶³

Flowlogic was one of six offerors. For various reasons, none of the offers was acceptable. Flowlogic's quotation stated that it could not conduct the training until October. Due to time constraints, the agency did not resolicit; instead, using prior market research, it contacted Training Technologies, Inc. (TTI). After receiving an oral quotation and performing a technical and price review of TTI's program, the agency issued TTI a purchase order on 6 September. TTI delivered the software on 7 September. Because of the 11 September terrorist attack, the agency delayed the training, originally scheduled for 13-14 September, until 17-20 September.⁶⁴ Flowlogic argued that the changes in the required delivery dates indicated that the RFQ's delivery schedule overstated the agency's needs. Disagreeing, the GAO found that the schedule was delayed not due to changing needs, but rather due to the unsuccessful competition and the 11 September events. Further, because Flowlogic could not

deliver until October, it could not have even met the relaxed requirements. The GAO therefore condoned the sole-source order.⁶⁵

In *Keystone Ship Berthing, Inc.*,⁶⁶ the Navy Military Sealift Command (MSC) included a "reduction in contract" clause in its RFP for layberth services.⁶⁷ The clause allowed MSC to reduce the rate paid to the contractor if the layberth became unfit for safe berthing for any reason "not due to the fault of the government."⁶⁸ Keystone Berthing Inc. (KSB) alleged that the provision was contrary to the termination for default clause at FAR section 52.249-8(c)⁶⁹ because the clause allowed the MSC to penalize KSB for occurrences beyond the control and without the fault of KSB.⁷⁰ Further, KSB asserted, the reduction in contract clause was unduly burdensome on competition because the clause required a contractor to assume risks for which it could not be terminated for default under FAR section 52.249-8(c).⁷¹

The GAO first determined that the clause was not inconsistent with the FAR.⁷² The GAO then found that KSB's competition allegation amounted to no more than disagreement with the government's method for allocating risk. In light of the mis-

59. *Id.* at 7.

60. Comp. Gen. B-289173, Jan. 22, 2002, 2002 CPD ¶ 22.

61. *Id.* at 1.

62. *Id.* at 1-2.

63. *Id.* at 3.

64. *Id.*

65. *Id.* at 3.

66. Comp. Gen. B-289233, Jan. 10, 2002, 2002 CPD ¶ 19.

67. *Id.* at 1.

68. *Id.* at 2.

69. FAR, *supra* note 8, at 52.249-8(c). FAR section 52.249-8(c) provides, in pertinent part:

[T]he Contractor shall not be liable for any excess costs if the failure to perform the contract arises from causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include—

- (1) acts of God or of the public enemy,
- (2) acts of the Government in either its sovereign or contractual capacity,
- (3) fires,
- (4) floods,
- (5) epidemics,
- (6) quarantine restrictions,
- (7) strikes,
- (8) freight embargoes, and
- (9) unusually severe weather.

Id.

70. *Keystone Berthing*, 2002 CPD ¶ 19, at 2-3.

71. *Id.* at 4.

sion-essential nature of layberth services, the MSC's reduction in contract clause reasonably served "as an incentive to the contractor to anticipate contingencies and to act in a manner that [would] minimize . . . any disruptions" in performance.⁷³ In addition, the GAO pointed out that the MSC received five to ten initial proposals, suggesting that the clause did not preclude competition.⁷⁴

"Scope" at Two Fora

Whether contract modifications were beyond the scope of their underlying contract vehicles proved a fertile—but ultimately unsuccessful—ground for protestors during the past year at both the Court of Federal Claims (COFC) and the GAO.⁷⁵ To determine whether a modification is beyond the original agreement's scope, the GAO looks at "whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contracts are essentially and materially different."⁷⁶ The GAO compares the modified contract with the original agreement or solicitation, using such factors as the type of work, costs, and performance period.⁷⁷

In *HG Properties A, LP*,⁷⁸ the protestor challenged the post-award modification of a lease changing the building site location. The Department of Veterans' Affairs (VA) awarded a lease to Premier Office Complex, Inc. (POC) to provide building space for a VA medical facility in Canton, Ohio.⁷⁹ The solicitation for offers (SFO) included detailed architectural requirements and specific requirements for specialized services, "utilities, maintenance, and environmental management."⁸⁰ Further, the property had to be "free of hazardous materials."⁸¹ On the other hand, the SFO location requirements were broad and general.⁸²

Soon after the award, POC discovered hazardous materials at the proposed building site. Shortly thereafter, POC proposed a new site four blocks from the first location. The new location met the SFO's requirements, and the government accepted this change. POC also agreed to abide by all other previously-proposed terms and conditions, including price and the performance period.⁸³

The protestor, HG Properties, argued that because location was an SFO factor, the change in site was a cardinal change outside the lease's scope.⁸⁴ Looking at the purpose and nature of

72. *Id.* at 4. The GAO agreed with the agency's argument that the remedies in the reduction in contract clause were "not inconsistent with the FAR termination for default clause, but rather provide[d] under the terms of the contract for additional remedies." *Id.*

73. *Id.* at 3.

74. *Id.* at 5.

75. *CESC Plaza LP v. United States*, 52 Fed. Cl. 91 (2002); *Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443 (2001); *HG Props. A, LP, Comp. Gen. B-290416*, B-290416.2, July 25, 2002, 2002 CPD ¶ 128; *Atlantic Coast Contracting, Inc., Comp. Gen. B-288969.4*, June 21, 2002, 2002 CPD ¶ 104; *Symetrics Indus., Inc., Comp. Gen. B-289606*, Apr. 8, 2002, 2002 CPD ¶ 65; *Eng'g & Prof'l Servs., Inc., Comp. Gen. B-289331*, Jan. 28, 2002, 2002 CPD ¶ 24.

76. *HG Props.*, 2002 CPD ¶ 128, at 3-4.

77. For example, in *HG Properties*, the GAO wrote:

In assessing whether the modified work is essentially the same as the effort for which the competition was held and for which the parties contracted, we consider, for instance, factors such as the magnitude of the change in relation to the overall effort, including the extent of any changes in the type of work, performance period, and costs between the modification and the underlying contract.

Id. at 4.

78. *Id.*

79. *Id.* at 1.

80. *Id.* at 2. "Particular design requirements were set out for waiting and examination rooms . . . office space for personnel, and space for equipment storage. The SFO also set forth highly specialized specifications for specific medical treatment and laboratory areas." *Id.* Specialized services included security and custodial services. *Id.*

81. *Hg Props.*, 2002 CPD ¶ 128, at 2.

82. *Id.* Referencing the SFO, the GAO wrote:

No specific property location was identified; rather, offered properties had to be located within a designated area of consideration, defined in the SFO by reference to certain city boundaries. Such properties had to be located in a prime commercial office district with professional surroundings, be reasonably accessible to public transportation and highways, and include a minimum of 125 on-site parking spaces.

Id.

83. *Id.* at 3.

the lease, the GAO disagreed, finding that the location change was not “so material to the overall effort . . . as to be outside” the scope.⁸⁵ Contrasting the detailed configuration and services specifications, which POC did not alter, with the broad location requirement, the GAO concluded that the change in site did not “materially change the nature or purpose of the lease.”⁸⁶ The GAO denied the protest.⁸⁷

The COFC and CAFC apply a similar analysis, using somewhat different “catch phrases,” when determining whether a modification is beyond the scope of its initial contract vehicle. In *CESC Plaza LP v. United States*,⁸⁸ the COFC wrote that “modifying the contract so that it materially departs from the scope of the original procurement violates CICA.”⁸⁹ Determining whether the modification “materially departed” from the original contract, the COFC compared the modified contract with the “scope of competition conducted to achieve the original contract.”⁹⁰ In addition to examining changes in the type of work, performance period and costs, the COFC asked “whether the modification is of a nature which potential offerors would reasonably have anticipated.”⁹¹

CESC involved modifications to a lease which the General Services Administration (GSA) obtained on behalf of the

Patent and Trademark Office (PTO), for office space for the consolidated PTO in northern Virginia. Seven months after award to LCOR Alexandria, Inc. (LCOR), LCOR proposed, and the GSA accepted, a list of lease changes. LCOR needed the changes to obtain adequate financing.⁹² In addition, LCOR entered into a separate lease directly with the GSA for 3561 parking spaces and adjacent office spaces. The plaintiffs sought injunctive relief, asking the COFC to reopen the procurement.⁹³ Interestingly, the plaintiffs did not allege that the final building was outside the scope of the initial SFO. Rather, the plaintiffs argued “that the changes allow LCOR to finance the construction of the building in a way which gives it advantages not available to other bidders.”⁹⁴ The amended lease, the plaintiffs asserted, increased LCOR’s cash flow and shifted payment and performance risks to the government in a way that the SFO did not permit.⁹⁵

The COFC first examined six specific changes to the lease that the plaintiffs alleged would, when combined, “add significantly to the cash flow features” and therefore exceed the SFO’s mandated rent cap.⁹⁶ These changes included “base rent increase,”⁹⁷ “square footage increase,”⁹⁸ “LCOR’s receipt of \$6,000,000 per year for parking,”⁹⁹ “real estate tax,”¹⁰⁰ “up front cash contribution,”¹⁰¹ and “design changes.”¹⁰² The square

84. *Id.*

85. *Id.* at 4.

86. *Id.*

87. *Id.* at 6. During the past fiscal year, the GAO heard and denied two other protests alleging out-of-scope modifications: *Atlantic Coast Contracting, Inc.*, Comp. Gen. B-288969.4, June 21, 2002, 2002 CPD ¶ 104 (determining that a contract modification for garbage collection and disposal services which required the contractor to use its own vehicles, rather than government-furnished vehicles as initially solicited, was not beyond the initial contract’s scope because the fundamental nature or purpose of the contract remained unchanged); and *Engineering & Professional Servs., Inc.*, Comp. Gen. B-289331, Jan. 28, 2002, 2002 CPD ¶ 24 (concluding that an engineering change proposal (ECP) providing technologically-advanced handheld computers was not outside scope of the basic contract when the initial RFP included a wide array of hardware and software and envisioned the use of ECPs for technological advancements, and when the modification did not “change the fundamental nature and purpose of the underlying contract”).

88. 52 Fed. Cl. 91 (2002). Other COFC cases addressing this issue during the past year include *Northrop Grumman Corp. v. United States*, 50 Fed. Cl. 443 (2001) (holding that delivery orders for radar systems did not relax or loosen contract requirements sufficiently to constitute cardinal changes to the contract), and *VMC Behavioral Healthcare Services v. United States*, 50 Fed. Cl. 328 (2001) (holding that a massive increase in the volume of services did not constitute a material change when the addition was specifically contemplated in the solicitation, and when the protestor was an incumbent on the contract and thus in a unique position to anticipate the increase).

89. *CESC Plaza LP*, 52 Fed. Cl. at 93 (citing *AT&T Communications v. Wiltel, Inc.*, 1 F.3d 1201, 1204 (Fed. Cir. 2002)).

90. *Id.*

91. *Id.*

92. *Id.* at 92. The maximum annual rent was \$57,286,560, and the annual per-square-foot rent was twenty-four dollars per rentable square foot. The “project would constitute the largest lease ever executed by GSA.” *Id.*

93. *Id.* at 93-94.

94. *Id.* at 93.

95. *Id.*

96. *Id.* at 94-97.

97. *Id.* at 94.

footage increase and the receipt of the \$6 million both stemmed from a separate lease between LCOR and the GSA for additional parking and adjacent office space. As such, neither change was material.¹⁰³ The base rent increase was explicitly within the escalation allowed by the SFO.¹⁰⁴ The COFC found that the amended real estate tax provisions merely locked in the amount initially projected by LCOR in its final proposal. This was not a material change.¹⁰⁵ Similarly, the up-front cash contribution primarily fixed the time for payment. In exchange for the “added predictability in cash flow to LCOR, the GSA extracted some minor concessions.”¹⁰⁶ Finally, the design changes left the “end product basically the same,” and therefore were not outside of the SFO.¹⁰⁷ Thus, the court determined that none of these six items constituted “fundamental alterations” to the original SFO.¹⁰⁸

The COFC then examined the plaintiff’s argument that the combined effect of these changes, along with three additional modifications “gave LCOR a critical advantage in terms of the cost of its financing . . . by shifting the payment risk to the government.”¹⁰⁹ The court determined that none of the alleged additional modifications—a “fixed rent start date,” “unconditional obligation to pay rent,” and a “minimum renewal rent

rate and option to purchase”—materially altered the SFO.¹¹⁰ While the fixed rent start date was new, the government bargained for the change, thus “mitigat[ing] any shift in the burden of performance and payment.”¹¹¹ The final two alterations were not material changes.¹¹²

Despite the large number of alleged modifications, the COFC held that they were not, individually or collectively, “outside the scope of the SFO.”¹¹³ Noting the broad initial competition scope, the court acknowledged that changes between the SFO and the final lease would develop. The modifications, however, did not “improperly change the cash flow” or “improperly shift the payment/performance obligations.”¹¹⁴ The court denied the request for injunctive relief.¹¹⁵

Determining whether a task or delivery order is within the scope of its base contract requires analysis nearly identical to the analysis of whether a contract modification is within the scope of its original contract. For instance, in *Symetrics Industries*,¹¹⁶ the GAO stated, “In determining whether a task order is beyond the scope of the original contract, we look at whether there is a material difference between the task order and that contract The overall inquiry is whether the task order is of

98. *Id.* at 94-95.

99. *Id.* at 95.

100. *Id.* at 95-96.

101. *Id.* at 96-97.

102. *Id.* at 97.

103. *Id.* at 94-95.

104. *Id.* at 94.

105. *Id.* at 95-96. The initial SFO required the government to pay real estate taxes above a certain minimum amount, determined by a formula. The amended provision prospectively determined what the minimum amount would be based on then-available figures. Thus, the amended provision added certainty, but should not have materially altered the amount of tax the government would pay. *Id.*

106. *Id.* at 96-97.

107. *Id.* at 97.

108. *Id.*

109. *Id.* These other modifications included a “fixed rent start date,” an “unconditional obligation to pay rent,” and a “minimum renewal rent rate and option to purchase.” *Id.*

110. *Id.* at 97-100.

111. *Id.* at 98.

112. *Id.* at 98-100.

113. *Id.* at 100.

114. *Id.*

115. *Id.* at 101.

116. Comp. Gen. B-289606, Apr. 8, 2002, 2002 CPD ¶ 65.

a nature that potential offerors would reasonably have anticipated.”¹¹⁷ In *Symetrics*, the protestor challenged a task order to retrofit modems under a depot maintenance contract.¹¹⁸ Because retrofitting modems was within the broad definition of depot maintenance, potential offerors would reasonably have anticipated task orders for this work. Thus, the task order did not exceed the scope of the contract.¹¹⁹

Navy Says: “They’re Our Destroyers, You Can’t Use One, but Your Competitor Can;” GAO Says, “Not Unfair”

Competition to design and build the Navy’s next generation destroyer reached a pivotal stage on 19 August 2002, when the GAO denied Bath Iron Works Corporation’s (BIW) protest of a multi-billion dollar award to Ingalls Shipbuilding to serve as the DD(X) program’s design agent for technology development.¹²⁰ BIW alleged that the Naval Sea Systems Command failed to conduct the competition on a common basis.¹²¹ Specifically, BIW claimed that the Navy’s refusal to allow BIW to use a decommissioned destroyer for at-sea testing, while, for purposes of evaluation, accepting Ingalls’ proposed use, competitively disadvantaged BIW.¹²²

In earlier phases of the Land Attack Destroyer Program, the Blue Team (with BIW as the prime contractor) and the Gold Team (with Ingalls as the prime contractor) had developed individual destroyer designs.¹²³ In the solicitation for this phase, the DD(X) design agency required the winning contractor to

(1) design, develop and build, and conduct factory tests, land-based tests, and (where specified) at-sea tests of engineering development models (EDMs); and (2) engineer the results of the testing into the DD(X) system design based on the contractor’s DD 21 Phase II engineering, and that will meet the operational needs and requirements established in the [prior phases’] Operational Requirements Document.¹²⁴

To conduct the at-sea tests, BIW initially requested use of a decommissioned DD 963 Spruance Class destroyer. One BIW study indicated that the DD 963 was the “favored” at-sea platform for evaluating one of the EDMs.¹²⁵ The Navy denied the request.¹²⁶ The Blue Team final proposal revision (FPR), therefore, contemplated using a “modified commercial heavy lift ship” as its at-sea testing platform.¹²⁷ The Gold Team FPR, however, included—and was evaluated based on the use of—a decommissioned DD 963 for at-sea testing.¹²⁸ BIW alleged that this apparent differential treatment was improper.

The GAO began by stating one of government contracting’s “fundamental principles”: “[C]ompetition must be conducted on an equal basis, that is, offerors must be treated equally and be provided with a common basis” to prepare their offers.¹²⁹ Nonetheless, absent “competitive prejudice,” the GAO will not sustain a protest even if an error occurred in the procurement process.¹³⁰ For several reasons, the GAO found that denying

117. *Id.* at 5. Elaborating on the relevant factors, the GAO stated:

Evidence of such a material difference is found by reviewing the circumstances attending the procurement that was conducted; examining any changes in the type of work, performance period, and costs between the contract as awarded and as modified by the task order; and considering whether the original contract solicitation adequately advised offerors of the potential for the type of task order issued.

Id.

118. *Id.* at 1.

119. *Id.* at 7-8.

120. Bath Iron Works Corp., B-290470, B-290470.2, Aug. 19, 2002, 2002 CPD ¶ 133.

121. *Id.* at 2.

122. *Id.* at 11.

123. *Id.* at 2.

124. *Id.*

125. *Id.* at 8.

126. *Id.* at 9.

127. *Id.* at 10.

128. *Id.* at 10-11. At that time, the Gold Team apparently had not requested permission from any authorized Navy authority to use a decommissioned destroyer. *Id.*

129. *Id.* at 11.

the Blue Team use of a DD 963 did not result in competitive prejudice.¹³¹

First, after the initial request and rejection by the Navy, the Blue Team did not pursue efforts to use a DD 963.¹³² The Blue Team's failure to appeal or otherwise follow up the denial of the request suggested that the team did not view destroyer use as important to its proposal.¹³³ Second, the Navy reasonably determined that the Blue Team would not have technically benefited from proposing a DD 963 rather than a large commercial ship.¹³⁴ Finally, the Blue Team's proposal to use the commercial ship did not materially affect the ultimate evaluation.¹³⁵ Therefore, the GAO concluded, "the Blue Team was not competitively prejudiced by the agency's alleged unequal treatment."¹³⁶

BIW also asserted that the Navy improperly used "firewalled" information to the Gold Team's competitive advantage.¹³⁷ Raytheon, a member of the Gold Team, developed the radar system that the solicitation required both offerors to use. To prevent Raytheon from entering into an "exclusive arrange-

ment with one of the two DD 21 teams and refus[ing] to share" information with the competing team, the Navy established a firewall.¹³⁸ The firewall would ensure that Raytheon equitably provided information to both teams.¹³⁹

The Navy used firewalled information to evaluate both teams' offers. BIW argued that "by taking into account firewalled information in its evaluation of the Gold Team's radar approach, the Navy accorded the Gold Team an unfair competitive advantage."¹⁴⁰ The GAO held that contracting agencies may consider any evidence in evaluating proposals, "even if that evidence is entirely outside the proposal . . . so long as the use of the extrinsic evidence is consistent with established procurement practice."¹⁴¹ According to the GAO, because the firewall did not prevent government personnel from obtaining information, and because the offerors should have known that the Navy would consider such information, there was "no basis for questioning the agency's handling of firewalled information."¹⁴²

130. *Id.* at 13. "Where the record does not demonstrate that, but for the agency's actions, the protester would have had a reasonable chance of receiving the award," the GAO will not sustain a protest "even if a deficiency in the procurement is found." *Id.*

131. *Id.*

132. *Id.* at 13-15. The GAO opinion describes how the Navy's rejection was accomplished by an E-mail, and that the office with the ultimate authority to approve or deny the request was not the office that sent the E-mail. *Id.*

133. *Id.* at 15.

134. *Id.* at 15-17.

135. *Id.* at 17-19. The source-selection advisory council specifically found, "[T]he identity of the at-sea platform had no effect on its best value analysis." *Id.* at 19. In addition, the Gold Team's proposal was found to be technically superior and there was "no basis for concluding that [DD 963 use] would have materially altered the evaluation." *Id.*

136. *Id.* at 19.

137. *Id.* at 21-23. The GAO addressed and denied allegations of an incumbent's "competitive advantage" in two other cases this past year: *M & W Construction Corp.*, Comp. Gen. B-288649.2, Dec. 17, 2001, 2002 CPD ¶ 30 (holding that no organizational conflict of interest or unfair competitive advantage arises from the "mere existence of a prior or current contractual relationship between a contracting agency and a firm"); and *Snell Enterprises, Inc.*, B-290113, 2002 U.S. Comp. Gen. LEXIS 99 (June 10, 2002) (stating that an incumbent's advantage is improper if it is "created by an improper preference or other unfair action by the procuring agency").

138. *Bath Iron Works*, 2002 CPD ¶ 133, at 21.

139. *Id.*

140. *Id.* at 22.

141. *Id.* at 23.

142. *Id.* BIW also asserted that the Navy underestimated the Gold Team's performance costs. According to BIW, the Gold Team's costs, when properly estimated, would have exceeded the \$2.865 billion cap; therefore, the Navy should have rejected the Gold Team's proposal. *Id.* at 19. The GAO found that even if the Navy had waived the funding requirements, the waiver did not cause BIW any competitive prejudice. Specifically, the GAO concluded that BIW had not "shown that it would have increased its proposed effort so as to materially improve its competitive position had it known that additional funding . . . would be available." *Id.* at 20.

*GAO Condones Two Sole-Source Contract Awards to Incumbents*¹⁴³

In *Global Solutions Inc.*,¹⁴⁴ the Department of Labor (DOL) awarded a one-year sole-source contract for Job Corps services to the incumbent contractor.¹⁴⁵ The services consisted of operating a residential educational and training facility.¹⁴⁶

On 1 February 2002, the DOL issued an RFP as a small business set-aside, for operation of the Potomac Job Corps Center in Washington, D.C.¹⁴⁷ Two weeks later, Global filed a size standard appeal with the Small Business Administration (SBA). On 5 March, the SBA granted Global's appeal.¹⁴⁸ As a result, the agency cancelled the solicitation, citing a need to review its size standard requirements. Soon thereafter, the DOL initiated formal rulemaking with the SBA; a process that was anticipated to take about one year. Since the Potomac Job Corps Center was providing services to approximately 500 students—including residential services to 425 students—and had to continue operations, the DOL awarded a sole-source contract to the incumbent contractor.¹⁴⁹

Global, which had filed several challenges against prior iterations of this procurement, protested the sole-source award.¹⁵⁰ Global did not question the agency's immediate need for the continued services; nor did Global allege that any firm other than the incumbent could have met the immediate need. Instead, Global contended that the sole-source authorizing official "should have been told of Global's earlier protest contentions."¹⁵¹ Global did not show how these matters would have had any impact on the decision-maker, nor did Global challenge

the basis relied upon in the justification and approval (J & A) for the sole-source award.¹⁵² Therefore, "given the unchallenged, immediate need" for the services and "the extended transition period required for any change of contractor, the record shows that the agency reasonably determined that there was only one available source for the required services" while the agency resolved the size standard issue.¹⁵³

*Bannum, Inc.*¹⁵⁴ involved another "bridge" contract awarded to an incumbent contractor. As in *Global Solutions*, the sole-source award in *Bannum* resulted, at least in part, from earlier legal efforts by the protestor. On 1 August 2000, the Bureau of Prisons (BOP) solicited for halfway house services. The BOP received and evaluated three proposals, including one from Bannum and one from the incumbent, Keeton Corrections, Inc. (Keeton). After prolonged negotiations caused the agency to extend the incumbent's contract, the BOP awarded to Keeton in November 2000.¹⁵⁵ Bannum protested the award. In response, the BOP canceled the solicitation and terminated the incumbent's contract for convenience on 7 December 2001.¹⁵⁶

Since the current contract was scheduled to end on 28 February 2002, the BOP prepared a J & A for a competition for a one-year contract, limited to the three prior offerors. The J & A, finalized on 9 January 2002, relied on FAR section 6.302-2, "unusual and compelling urgency."¹⁵⁷ All three offerors submitted proposals. Even though Bannum participated in the competition, it alleged that the 1 March start date made this a "de facto sole-source procurement" because only the incumbent "with its currently operating facility, can meet the RFP's

143. *Global Solutions Inc.*, Comp. Gen. B-290107, June 11, 2002, 2002 CPD ¶ 98; *Bannum, Inc.*, Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD ¶ 61. In a third case, the GAO sustained the protest of a sole-source order from a federal supply schedule. *Reep, Inc.*, B-290665, 2002 U.S. Comp. Gen. LEXIS 137 (Sept. 17, 2002). For further discussion of *Reep*, see *supra* Part II.J, *Multiple Award Schedules*.

144. Comp. Gen. B-290107, June 11, 2002, 2002 CPD ¶ 98.

145. *Id.* at 1, 5-7.

146. *Id.* at 1.

147. *Id.* at 2.

148. *Id.* at 2-3.

149. *Id.* at 3.

150. *Id.* at 5.

151. *Id.* at 6.

152. *Id.*

153. *Id.* at 7.

154. Comp. Gen. B-289707, Mar. 14, 2002, 2002 CPD ¶ 61.

155. *Id.* at 1.

156. *Id.* at 1-2.

157. *Id.* at 2.

preparatory start-up schedule and performance start date.”¹⁵⁸ Bannum also argued that the short preparation period resulted from a lack of advanced planning.¹⁵⁹

The Comptroller General found “no evidence” of a lack of advance planning. The lengthy pre-award process and consequent urgency resulted from delays in the evaluation, the filing of two protests, and the termination of the initially-awarded contract.¹⁶⁰ Therefore, “while the agency’s planning ultimately was unsuccessful, this was due to unanticipated events, not a lack of planning.”¹⁶¹

Agency Reasonably Classifies Feeding Pump CLIN as “Subsistence”

Publicizing is an important component of competition. In *Kendall Healthcare Products Co.*,¹⁶² the protestor alleged that the Department of Veterans Affairs, National Acquisition Center (VANAC) misclassified a contract action in the *Commerce Business Daily* and thereby excluded the protestor from the competition.¹⁶³ The commercial item RFP included forty-six line items. Forty-four of the items were dietary supplements

“for the management of malnutrition and other medical conditions.”¹⁶⁴ Many of these products were provided in “ready-to-hang” (RTH) bags. The remaining two line items were for feeding pump sets, used in conjunction with the RTH products.¹⁶⁵ Required to select one classification code for the entire contract action,¹⁶⁶ the VANAC listed the procurement under code 89, “subsistence.”¹⁶⁷ Kendall Healthcare argued that feeding sets were properly classified under code 65, “Medical, dental and veterinary equipment and supplies.”¹⁶⁸ According to the Comptroller General, the VANAC’s classification of the procurement under code 89 was not unreasonable. The GAO denied the protest.¹⁶⁹

DOJ Sues to Ensure Nuclear Shipbuilding Competition

On 22 October 2001, the Departments of Defense (DOD) and Justice (DOJ) dashed General Dynamics’ hopes of acquiring Newport News Shipbuilding (Newport News). On that date, the DOD announced its decision to recommend to DOJ approval of Northrop Grumman’s efforts to acquire Newport News and its decision to recommend disapproving General Dynamics merger plans.¹⁷⁰ The DOJ then brought an antitrust

158. *Id.*

159. *Id.* Referencing the pertinent statutory authority, the GAO stated:

An agency may use other than competitive procedures where its needs are of such an unusual and compelling urgency that the government would be seriously injured if the agency did not limit the number of sources from which bids or proposals are solicited. . . . A contract may not be awarded using other than competitive procedures, however, where the urgent need for the requirement has been brought about by a lack of advance planning by contracting officials.

Id. (citing 41 U.S.C. § 253(c)(2) (2000); FAR, *supra* note 8, at 6.302-2(a)(2)).

160. *Id.* at 3.

161. *Id.* Bannum also complained about the contract period. Bannum asserted that the period should be six months, rather than one year. BOP, however, presented sufficient evidence demonstrating that the agency needed one year to properly conduct a proper procurement for long-term halfway house services. *Id.* at 3-4.

162. Comp. Gen. B-289381, Feb. 19, 2002, 2002 CPD ¶ 42.

163. *Id.* at 1.

164. *Id.* at 2.

165. *Id.*

166. See FAR section 5.207, which states, in pertinent part, that “only one classification code shall be reported.” FAR, *supra* note 8, at 5.207(h)(3). It further states:

Each synopsis shall classify the contemplated contract action under the one classification code which most closely describes the acquisition. If the action is for a multiplicity of goods and/or services, the preparer should select the one category best describing the overall acquisition based upon value. Inclusion of more than one classification code, or failure to include a classification code, will result in rejection of the synopsis by the Commerce Business Daily.

Id. at 5.207(c)(4).

167. *Id.* at 4.

168. *Id.* at 5.

169. *Id.* at 6.

170. *Newport News Shipbuilding Notified of Department of Defense Recommendation*, PR Newswire, Oct. 23, 2001, LEXIS, PR Newswire File.

suit to prevent the merger of Newport News and General Dynamics. A General Dynamics-Newport News combination would leave only one company capable of manufacturing nuclear-powered ships. According to Charles James, the DOJ's antitrust chief, "This merger-to-monopoly would reduce inno-

vation and, ultimately, the quality of products supplied to the military, while raising prices to the U.S. military and to U.S. taxpayers."¹⁷¹ Clearly, someone believes that competition works. Lieutenant Colonel Benjamin.

171. *Aldridge Favors Northrop in Newport News Deal; DOJ Sues to Block General Dynamics' Bid*, 43 GOVT CONTRACTOR 40, ¶ 415 (Oct. 31, 2001).

Contract Types

CAFC Revises the “Delta” That IDIQ Contractor Is Entitled to When Government Fails to Order the Minimum

Last year’s *Year in Review*¹ commented on *Delta Construction International, Inc. (Delta)*,² the first board decision to endorse the view that a contractor may receive more than just anticipated profits when the government breaches an Indefinite-Delivery, Indefinite-Quantity (IDIQ) contract.³ In *Delta*, the Armed Services Board of Contract Appeals (ASBCA) found that the minimum guarantee served as the government’s consideration for the contractor’s promise to maintain a minimum daily workload capability level. Consequently, the board held that the contractor was entitled to the difference between that guaranteed minimum and the amount the government had ordered.⁴

Over the past year, several decisions have followed the precedent established in *Delta*.⁵ The government, recognizing that these decisions could represent the tip of an iceberg, appealed the ASBCA’s *Delta* decision to the Court of Appeals for the Federal Circuit (CAFC). The CAFC reversed, noting that “the general rule is that damages for breach of contract shall place the wronged party in as good a position as it would have been in, had the breaching party fully performed its obligation.”⁶ The CAFC found that the board’s decision violated this rule; paying Delta the entire difference would overcompensate it because Delta would have incurred additional costs if it had actually been ordered to perform the additional work.⁷

Before the CAFC, Delta argued that the court’s decision in *Maxima Corp. v. United States*⁸ had established an exception to

the general rule regarding the calculation of damages, at least when the contract required a minimum capability. The CAFC disagreed, noting that

the result of the court’s decision in *Maxima* was that the contractor would retain the amount the government had paid it, representing the difference between the guaranteed minimum and the amount of work the government had ordered. That resulted, however, not because the court approved the basis of payment (it did not address that issue), but because the court found improper the method the government used to recapture the payment (retroactive termination for convenience).⁹

Exactly what amount of damages would put Delta in as good a position as it would have been in, had the United States fully performed its obligation, remains unanswered.¹⁰

I’ve Heard of Avoiding Lawn Mowing, But . . .

One case that followed the ASBCA’s *Delta* ruling was *Howell v. United States*.¹¹ *Howell* involved ten separate Farmers Home Administration (FmHA) IDIQ contracts for lawn mowing and grounds maintenance at various FmHA properties in Florida.¹² Each of the contracts incorporated the “Indefinite Quantity” clause found at FAR section 52.216-22,¹³ as well as a special clause in Section I, both of which required the government to order “at least the quantity of . . . services designated in the Schedule as the ‘minimum.’”¹⁴ Unfortunately, nothing in

1. See Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 19-20 [hereinafter *2001 Year in Review*].

2. ASBCA No. 52162, 01-1 BCA ¶ 31,195, modified on other grounds, 01-1 BCA ¶ 31,242.

3. *Id.* Until *Delta* was decided, the only other decision supporting this contention was *Maxima Corp. v. United States*, 847 F.2d 1549 (Fed. Cir. 1988), on which the ASBCA relied heavily to reach its *Delta* holding. *Delta*, 01-1 BCA ¶ 31,195, at 10.

4. ASBCA No. 52162, 01-1 BCA ¶ 31,195, at 154,028.

5. See, e.g., *Howell v. United States*, 51 Fed. Cl. 516, 524 (2002); *Hermes Consolidated, Inc.*, ASBCA Nos. 52308, 52309, 02-1 BCA ¶ 31,767, at 156,898; *Mid-Eastern Indus., Inc.*, ASBCA No. 53016, 01-2 BCA ¶ 31,657, at 156,403.

6. *White v. Delta Constr. Int’l, Inc.*, 285 F.3d 1040, 1043 (Fed. Cir. 2002) (citing *Mass. Bay Transp. Auth. v. United States*, 129 F.3d 1226, 1232 (Fed. Cir. 1997)).

7. *White*, 285 F.3d at 1040.

8. 847 F.2d at 1549.

9. *White*, 285 F.3d at 1044.

10. *Id.* at 1046. The CAFC did note that the contracting officer considered the \$11,216 that it had already awarded Delta to be compensation for profit and overhead as well as for labor costs that Delta would have “incurred while remaining available to perform work the government should have given it.” *Id.* at 1045. The CAFC ruled that, based upon the record, it could not tell whether this was correct; the CAFC remanded the case to the ASBCA for further review. *Id.*

11. 51 Fed. Cl. 516 (2002).

12. *Id.* at 517.

any of the contracts' schedules expressly established this minimum quantity of services. The statements of work found in Section C of the contracts, however, provided that "[a]dditional mowing of the farm acreage will be decided by the [contracting officer's representative] but shall not be less than twice during the [twelve]-month contract period."¹⁵

When the government failed to order any services under seven of these ten contracts, Howell, the contractor, submitted an invoice for \$93,288 for services which it believed these contracts required the government to order.¹⁶ Howell calculated this amount by concluding that it was entitled to cut each property twice and perform an initial service on each; according to Howell, the statements of work required it to perform additional mowing at least twice after the initial service call.¹⁷ The contracting officer refused payment on these invoices, but acknowledged that the government had committed to ordering a minimum quantity. The contracting officer unilaterally established these required minimums at between \$200 and \$2000 for each of the seven contracts in which the government had not ordered any services, a total of \$5100. The contractor filed suit to recover the difference between its own computations for the minimums and the \$5100 it received from the government.¹⁸

At trial, the government argued that each contract was invalid and unenforceable because each failed to contain a guaranteed minimum.¹⁹ The Court of Federal Claims (COFC) disagreed, observing the common law principle which indicates that "[w]hen the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."²⁰ The

court then determined that the parties had intended to form a binding agreement that did include some guaranteed minimum.²¹

The court also distinguished several prior cases that had held IDIQ contracts to be illusory and unenforceable if they lacked a guaranteed minimum. The court reasoned that the prior cases concerned contracts that did not contain FAR section 52.216-22, meaning that the government was not obligated to order any quantity whatsoever. The court pointed out that the *Howell* IDIQ contracts contained this clause, thus requiring the government to order "*some* minimum quantity of plaintiff's services."²² Lastly, the court had to calculate a quantity to supply for the missing "minimum" in the contract. Here, the court looked at the contracting officer's letter sent in response to Howell's invoice, in which the contracting officer unilaterally established a minimum of \$200 on three contracts, \$500 on one contract, \$1000 on two contracts, and \$2000 on another. The court found the \$1000 and \$2000 amounts to be non-nominal, but found that a mere "few hundred dollars . . . would not have compensated plaintiff for the costs associated with his obligation to stand ready to perform services upon short notice" or for foregoing other employment.²³ It therefore determined that the amounts the contracting officer established for the remaining four contracts were nominal and substituted \$1000 in their place.²⁴ The court indicated that it considered this amount to be non-nominal because Howell would have received at least \$500 to cut even the smallest of properties on any of these three contracts, and once the government ordered the initial cutting, it would have been obligated to order a second cutting, again costing the government at least \$500.²⁵

13. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 52.216-22 (July 2002) [hereinafter FAR].

14. *Hermes*, 51 Fed. Cl. at 519 (quoting FAR, *supra* note 13, at 52.216-22).

15. 51 Fed. Cl. at 520.

16. *Id.* at 518. The contractor later amended this claim to cover services it believed the government was required to order under the additional three contracts in which the government had ordered some amount of services. *Id.*

17. *Id.* at 519. The contract indicated that the contractor would get \$450 for performing an "Initial Service" and twelve dollars per acre for mowing each property. It also indicated that if a property were under forty acres, Howell would get \$500 for mowing that property. *Id.*

18. *Id.* at 518-19.

19. *Id.* at 520.

20. *Id.* at 520-21 (citing RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981)).

21. *Id.* at 522. The contracting officer wrote two letters to Howell and a separate memorandum for her file that acknowledge that the government was obligated to purchase a guaranteed minimum. The court found these facts persuasive. *Id.*

22. *Id.* at 523.

23. *Id.* at 524.

24. *Id.* The court also awarded Howell \$6,098.16 to compensate it for a second mowing on each property on the other three contracts that the government had mowed a single time. *Id.* at 526-27.

25. *Id.* at 524.

The court's logic seems flawed. There is no apparent relationship between the court-supplied term of \$1000 for a guaranteed minimum and the costs of standing ready to perform and foregoing other business opportunities. The logic also implies that the smallest order the government may make under an IDIQ contract is *de facto* a non-nominal quantity. If, for example, the government had a widget contract in which the maximum number of widgets it could order was set at one billion, and the contract contained a clause indicating that each organization placing a first order for widgets had to submit a second order for widgets, would the COFC deem two orders from a single organization for one widget each to be a non-nominal quantity?

The Overlap Between IDIQ Contracts and Options

The CAFC's recent holding in *Varilease Technology Group, Inc. v. United States*²⁶ sanctions the use of a single minimum quantity in IDIQ contracts containing multiple periods of performance. In *Varilease*, the Defense Information Systems Agency (DISA) awarded a five-year IDIQ contract for the maintenance of its Unisys computers to Varilease in March 1998. The contract expressly stated the following:

This is an indefinite-delivery, indefinite-quantity (ID/IQ) contract utilizing Firm-Fixed-Price delivery/task Orders in accordance with FAR 16.500. Total orders placed against this contract shall not exceed \$50,000,000.00 over a five-year period (6-month base period, four 12-month and one 6-month option periods). The guaranteed minimum is \$100,000 for the basic period only. There is no guaranteed minimum for the option periods, if exercised.²⁷

The DISA placed approximately \$3 million in task orders during the base period of performance and over \$10 million in

task orders by the end of the third option period. Apparently, the DISA ordered much of the work during the base period or the beginning of the first option period because it began replacing its Unisys computers in September 1998; it either stopped placing new orders or canceled existing orders at this point. Varilease filed a claim alleging that the DISA breached its contract, which the contracting officer denied. Varilease then sued in the COFC. When the COFC granted summary judgment in favor of the government, Varilease appealed to the CAFC.²⁸ Before the CAFC, Varilease admitted that the initial six-month base period was an enforceable contract because it required the government to order a non-nominal minimum quantity—and the government did. Varilease argued, however, that “each option should be construed as creating a separate contract, and because each . . . separate option contract lacks a stated minimum order quantity (and hence consideration from the government), each option exercise must be found to create a requirements contract.”²⁹

The government asserted that the contract clearly indicated that each option period of performance was part of a single, unitary contract and that the exercise of each option merely extended the overall duration of that contract. The court looked at the wording in both the contract and the FAR section dealing with IDIQ contracts.³⁰ Both of these used singular language, such as “this contract” or “the contract,” which the court found inconsistent with Varilease's interpretation that each option exercise created a separate contract. The *Varilease* decision clearly demonstrates that the government may award IDIQ contracts containing multiple periods of performance and provide adequate consideration by including a requirement to purchase a non-nominal minimum in the base period.³¹

Government Lacks Consideration

The CAFC also wrestled with the adequacy of consideration in *Ridge Runner Forestry v. Veneman*.³² That case, however, deals with adequacy within the context of a requirements con-

26. 289 F.3d 795 (Fed. Cir. 2002).

27. *Id.* at 797.

28. *Id.* at 797-98.

29. *Id.* at 798.

30. FAR, *supra* note 13, at 16.504.

31. Varilease had also cited *Dynamics Corp. of America v. United States*, 182 Ct. Cl. 62, 389 F.2d 424 (1968), which held that the issuance of each order above the required minimum under an IDIQ contract was the exercise of an option, and as such, created a separate contract covering that order quantity. The real issue in *Dynamics Corp.* was the timeliness of the task orders. The court had to determine whether the issuance of each task order created a stand-alone contract to determine whether they were valid upon issuance or upon receipt. *See id.* at 430-32. The CAFC never adequately distinguished *Dynamics Corp.* from *Varilease*, concluding only that “the fact that an order pursuant to an option clause in an ID/IQ contract may lead to a separate supply contract for that order does not mean that” the separate supply contract will be a requirements contract because it does not contain a minimum quantity. *Varilease*, 289 F.3d at 800. Realistically, the court should have just held that *Dynamics Corp.* was bad law to the extent that it held that an option exercise necessarily resulted in a new stand-alone contract rather than the extension of the existing contract.

32. 287 F.3d 1058 (Fed. Cir. 2002).

tract. In *Ridge Runner*, the Forest Service entered into several Engine Tender Agreements that permitted, but did not require, the government to place orders with Ridge Runner and other fire companies to provide fire fighting equipment. The agreement further provided that “upon the request of the government, the contractor shall furnish the equipment offered herein to the extent the contractor is willing and able at the time of order.”³³ When the government did not order any equipment from it, Ridge Runner filed a claim for \$180,000, based on the government’s alleged violation of its duty of good faith and fair dealing. The contracting officer denied this claim, and when Ridge Runner appealed to the Department of Agriculture Board of Contract Appeals, it dismissed the case for lack of jurisdiction because the parties did not have an enforceable contract.³⁴

On appeal, Ridge Runner attempted to demonstrate that its agreement fit “squarely within [the *Ace-Federal Reporters, Inc. v. Barram*] holding.”³⁵ The court distinguished *Ace-Federal* on the grounds that it involved a series of requirements contracts, which required the government to order all of its court-reporting services from one of the contractors. In contrast, the court determined that the Engine Tender Agreements did not restrict the Forest Service to ordering only from the class composed of Engine Tender Agreement holders. Consequently, the CAFC affirmed the board’s decision.³⁶

“Shear” Audacity in Contracting for Spare Parts

The COFC also had an opportunity to review a requirements contract in *Hi-Shear Tech. Corp. v. United States*,³⁷ a case involving the adequacy of government estimates. In *Hi-Shear*, the Army’s Communications and Electronics Command (CECOM) entered into two different five-year contracts with Hi-Shear to provide a total of sixteen different spare parts for the T-39 circuit switch. The solicitations and resultant contracts each contained the “Requirements” clause,³⁸ thus requiring the Army to purchase its entire need for each of these sixteen spare parts from Hi-Shear. They also contained estimates of the gov-

ernment’s requirements for each of these parts for each of the annual performance periods.³⁹

In calculating these estimates, the CECOM item manager considered data documenting how many broken parts units in the field historically sent back for repair. These repaired spare parts reduced the government’s requirements. Unfortunately, this data reflected returns made under an Army policy that did not require field units to pay for spare parts but forced them to pay for the return shipping of any broken parts. Consequently, units in the field had little incentive to return broken parts.

By the time CECOM had issued the solicitation, however, the Army recognized that its policy was causing waste, and had changed its policy to require units to pay for spare parts, but not to pay for return shipping of any broken parts. Unsure of how much of a difference this change of policy would have on the number of returned parts, the item manager sought advice from his branch and division chiefs. These individuals told him to estimate the number of returns at a revised rate of twenty-five percent. At this time, there was also a change in item managers, and the outgoing manager never effectively communicated this twenty-five-percent estimate to the new item manager, who ultimately prepared the government estimates.⁴⁰

By the third year of the contract, CECOM had placed orders against these contracts for less than twelve percent and twenty percent of the estimated annual quantities for the two contracts.⁴¹ Consequently, Hi-Shear filed claims for \$310,319 and \$53,330, respectively, representing profits and fixed overhead on the difference between the ordered quantities and the estimated quantities provided in the contracts. Hi-Shear alleged that government negligence caused the shortfalls.⁴² The government denied these claims, asserting that the “substantial variance” between the estimates and the quantities the government actually ordered resulted from funding cuts.⁴³

When Hi-Shear appealed these denials to the COFC, however, the government admitted that funding had nothing to do

33. *Id.* at 1060.

34. *Id.*

35. *Ridge Runner*, 287 F.3d at 1061 (citing *Ace-Federal Reporters, Inc. v. Barram*, 226 F.3d 1329 (Fed. Cir. 2002)).

36. *Id.* at 1062.

37. 53 Fed. Cl. 420 (2002).

38. FAR, *supra* note 13, at 52.216-21.

39. 53 Fed. Cl. at 425-26.

40. *Id.* at 423.

41. *Id.* at 426.

42. *Id.* at 426-27.

43. *Id.* at 427.

with the shortfalls. At trial, the government instead indicated that a reduction in the size of the Army and the change in Army policy concerning charging for spares and their return shipping caused the shortfall. The government alleged that the effect of the policy change was indeterminable at the time it issued the solicitation; therefore, it was not negligent in preparing the estimates.⁴⁴

The court, citing precedent, noted that the government “is not free to carelessly guess at its needs” and instead must calculate its estimates based upon “all relevant information that is reasonably available to it.”⁴⁵ The court recognized that CECOM could not determine the exact effect the policy change would have on its requirements for T-39 spares, but it also emphasized that CECOM knew that there would be a substantial reduction in requirements, for which it did not account when it prepared its estimates. The court ruled in favor of Hi-Shear, determining that CECOM negligently failed to base its estimates on the change in policy.⁴⁶

Hi-Shear was only partially victorious, however, because the court also determined that it could not recover its profit and overhead on the entire difference between the estimated and ordered quantities. The court ultimately substituted the branch and division chiefs’ estimate of a twenty-five percent part return rate, apparently believing that the government should have known that the return rate would reach at least this level. The court also accepted the government’s contention that a portion of the unordered quantities was associated with a reduction in the size of the military. As a result, the court allowed recovery based upon the difference between the estimates the agency actually used and the “should have used” estimates it had calculated, using the twenty-five-percent return rate.⁴⁷

Around the same time the COFC issued its *Hi-Shear* ruling, the ASBCA tackled a nearly identical issue in *S.P.L. Spare Parts Logistics, Inc.*⁴⁸ In *S.P.L.*, the contractor alleged that the Army’s Tank and Automotive Command (TACOM) had negligently prepared its estimated quantities of requirements for replacement road wheels for the M-60 tank. The item manager who developed the estimates assumed that the Army would procure new road wheels to satisfy all of its road wheel requirements. This assumption did not consider Department of Defense guidance that required units to repair used road wheels whenever repair was less expensive than replacement.⁴⁹ Deciding only the issue of entitlement, the board sustained S.P.L.’s appeal, determining that the TACOM was negligent in not factoring in this policy when it calculated its estimated required quantities.⁵⁰

The significance of these decisions is that the government cannot prepare its estimates carelessly. It must use the best and most current information at its disposal to calculate rationally based estimates.

Doing the Minimum Just Isn’t Enough

Last year’s *Year in Review*⁵¹ also commented on *Travel Centre v. Barram*,⁵² which held that “when an IDIQ contract . . . indicates that the contracting party is guaranteed no more than a non-nominal minimum amount of sales, purchases exceeding that minimum amount satisfy the government’s legal obligation under the contract.”⁵³ More recently, the ASBCA revisited this issue in *Community Consulting, Int’l*.⁵⁴ and arrived at a slightly different outcome.

44. *Id.* at 427-28.

45. *Id.* at 429 (citing *Medart, Inc. v. Austin*, 967 F.2d 579, 581 (Fed. Cir. 1992); *Womack v. United States*, 389 F.2d 793, 801 (Ct. Fed. Cl. 1968)).

46. *Id.* at 429-30.

47. *Id.* at 438-43. The court also held that Hi-Shear was only entitled to receive overhead, not profit, on this difference. *Id.* at 444. The court also refused to grant Hi-Shear any overhead associated with the third and fourth option years because the government elected not to exercise those options after Hi-Shear filed its claims in the middle of the second option year. *Id.* at 442-43.

48. ASBCA Nos. 51118, 51384, 02-2 BCA ¶ 31,982.

49. *Id.* at 158,074-75.

50. *Id.* at 158,079. The ASBCA also held that the government was negligent in not revising its estimates for the base year after a congressional inquiry delayed the award of the contract, causing TACOM to procure roughly half of its base year’s requirement from another source before the contract was even awarded. The court further held that the government breached its requirement to purchase solely from S.P.L. by purchasing from another vendor during the period of performance. *Id.* at 158,080.

51. See 2001 *Year in Review*, *supra* note 1, at 18-19.

52. 236 F.3d 1316 (Fed. Cir. 2001), *rev’g* *Travel Centre v. Gen. Servs. Admin.*, GSBCA No. 14057, 98-1 BCA ¶ 29,536.

53. *Id.* at 1319.

54. ASBCA No. 53489, 02-2 BCA ¶ 31,940.

In *Community Consulting*, the U.S. Agency for International Development (USAID) entered into a multiple-award IDIQ contract for “advisory services, technical assistance, and training in the area of sustainable urban management” in April 1999.⁵⁵ The contract indicated that the minimum quantity of services that USAID would order from each contractor would be \$50,000, and that the ceiling on the three-year basic period of performance was \$90 million, with a potential for an additional \$20 million if USAID exercised an option for a fourth and fifth year of performance.⁵⁶ In the eighteen months after award, USAID placed orders totaling \$1,719,503 with Community Consulting, International (CCI).⁵⁷ During this same time frame, the other five multiple awardees received orders having a combined ceiling of \$37,336,454. CCI filed a claim with USAID during the second year of performance, alleging that USAID breached its contractual requirement to give all award-ees a fair opportunity to compete on orders, and that this caused the discrepancy in order volume.⁵⁸ The contracting officer’s response indicated that he did not view CCI’s submission as a valid claim because it did not raise “issues relating to contract administration for which the Contract Disputes Act is applicable.”⁵⁹

When CCI appealed the claim’s deemed denial to the ASBCA, USAID asserted that the board did not have jurisdiction. USAID argued that CCI’s complaint was “nothing more than a collective bid protest on task orders”⁶⁰ and contended that CCI’s sole recourse was to submit a complaint to USAID’s

task and delivery order ombudsman. The board rejected this argument, finding that it did have jurisdiction because CCI’s allegation was “rooted squarely in the contractual promise” contained in the Section F clause entitled “Fair Opportunity to Be Considered.”⁶¹

USAID next contended that CCI was not entitled to any relief because USAID had already paid it more than the \$50,000 minimum guarantee. The board also rejected this argument, noting that “[w]hile the minimum quantity represents the extent of the Government’s purchasing obligation, . . . it does not constitute the outer limit of all of the Government’s legal obligations under an indefinite quantity contract.”⁶² The board added that “[w]hile respondent insists that its legal obligations to appellant have been satisfied once appellant had been awarded the \$50,000 minimum guaranteed amount in task orders, we cannot harmonize that result with other provisions in the contract.”⁶³ The board specifically noted that the “Fair Opportunity to Be Considered” clause in Section F described certain procedures that “shall be followed in order to insure that the Contractor shall have a fair opportunity to be considered for each task order” and determined that it could only give the phrase “each task order” its intended effect if it construed it to mean that the government had met both task orders, issued before and after the \$50,000 minimum guarantee.⁶⁴ Major Sharp.

55. *Id.* at 157,782.

56. *Id.* at 157,782-83.

57. *Id.* at 157,784. The board did not address the amount of money ultimately paid to the contractor, but it apparently exceeded the \$50,000 minimum. *Id.*

58. *Id.* at 157,784-85 (citing 41 U.S.C. § 253j(b) (2000); FAR, *supra* note 13, at 16.505). Apparently, CCI was only permitted to compete on twenty-six out of the fifty-one orders that the agency had placed up to that time. *Community Consulting*, 02-2 BCA ¶ 31,940, at 157,787.

59. *Id.* at 157,785.

60. *Id.* at 157,787. USAID also averred that such a protest was prohibited by 41 U.S.C. § 253j(d). *Id.*

61. *Id.*

62. *Id.* at 157,789.

63. *Id.* at 157,790.

64. *Id.* Since the board only considered entitlement, it did not discuss how many, if any, of the twenty-five orders on which CCI had been excluded from competing involved one of the exceptions to fair opportunity set forth in the FAR. *Id.*; see FAR, *supra* note 13, at 16.505(b)(2).

Sealed Bidding

I'm Not a Mind Reader

An agency must have a compelling reason to cancel an invitation for bids (IFB) after bid opening.¹ For example, an agency may cancel an IFB that fails to reflect the agency's needs. In *C-Cubed Corp.*,² the Government Printing Office³ (GPO) issued an IFB for the reproduction of documents to computer diskettes and CD-ROMS. The incumbent contractor, C-Cubed, submitted the apparent low bid—\$86,000 less than the next-lowest bid. The GPO asked C-Cubed to verify its bid. C-Cubed explained that it submitted a bid based on the current contract requirements. A review of the orders issued under the current contract confirmed that the estimated quantities in the solicitation were inaccurate. The agency realized that if it applied the corrected estimates to the bids, C-Cubed would be displaced as the low bidder.⁴ Rather than award to the new low bidder, the GPO cancelled the solicitation because it did not reflect the actual work to be performed; the GPO thus could not determine the “actual cost of the contract to the government.”⁵

The GAO held that the GPO had a reasonable basis to cancel the IFB. The GPO failed to provide bidders with accurate estimates to prepare bids, and C-Cubed was “uniquely positioned to recognize and take advantage of the inaccuracies in the initial

estimates.”⁶ The GAO denied the protest, reasoning that the corrected estimates were significantly different from the cancelled IFB, and that the corrected estimates changed the outcome of the competition.⁷

Chenega Management (Chenega)⁸ examined whether ambiguous or inadequate specifications are a basis to cancel an IFB after bid opening.⁹ In *Chenega*, the agency, the Maritime Administration (MARAD), issued an IFB for fuel and tug boat services. The MARAD rejected Chenega's bid as nonresponsible because it failed to comply with the IFB's refueling and tug boat specifications. The refueling specification required bidders to load a barge with fuel and transport the fuel to a ship “within a four hour notice.”¹⁰ A review of the solicitation revealed that the refueling specification was impossible to perform because it takes more than four hours to load a barge with enough fuel to refuel another vessel, without adding the time it takes to transport the fuel to the ship.¹¹ The tug boat service specification “failed to specify a minimum horsepower or the number of tugs, leaving open the question of what a contractor must be able to provide.”¹² The MARAD cancelled the solicitation and Chenega protested. Chenega claimed that it could meet the MARAD's needs under the IFB.¹³

The GAO denied the protest, finding the basis to cancel the solicitation compelling for two reasons. First, it agreed with the

1. Section 14.404(a)1 provides,

preservation of the integrity of the competitive bid system dictates that, after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.404-1(a)(1) (July 2002) [hereinafter FAR]; see also HDL Research Lab, Inc., B-254863.3, May 9, 1994, 94-1 CPD ¶ 298, at 5.

2. Comp. Gen. B-289867, Apr. 26, 2002, 2002 CPD ¶ 72.

3. *Id.* at 3. While the GPO is not subject to the FAR, the Procurement Regulation corresponds to FAR section 14.401-1. *Id.*

4. *Id.* at 2. C-Cubed listed “no charge” for four contract line items, including the production of 125,000 diskettes, 50,000 mailing labels for the diskettes, and 50,000 mailing labels for the CD-ROMS. C-Cubed explained that the agency rarely requested diskettes (eliminating the need for diskette mailing labels), and that the cost for the CD-ROM mailing labels was included in the CD-ROM production cost. *Id.*

5. *Id.* The agency revised the solicitation; it reduced the diskette estimates from 125,000 to 1000, increased the CD-ROM estimate from 7000 to 50,000, and reduced the mailing labels for the diskettes and CD-ROMS from 50,000 to 500 and 50,000 to 40,000, respectively. *Id.*

6. *Id.* at 3. C-Cubed argued the IFB was a requirements-type contract and that GPO was not obligated to order a particular quantity. *Id.*

7. *Id.*

8. B-290598, 2002 U.S. Comp. Gen. LEXIS 112 (Aug. 2, 2002).

9. FAR, *supra* note 1, at 14.404-1(c)(1) (“[I]nvitations may be cancelled and all bids rejected before award but after opening when, consistent with subparagraph (a)(1) of this section, the agency head determines in writing that . . . inadequate or ambiguous specifications were cited in the invitation.”).

10. *Chenega*, 2002 U.S. Comp. Gen. LEXIS 112, at *2. The MARAD alleged that Chenega failed to meet two IFB requirements, one to load a barge with fuel and transport it to the requesting ship within four hours, and the other to provide twenty-four hour tug boat services with sufficient tugs and horsepower to meet simultaneous docking and ship movement. The MARAD intended bidders to load a barge with fuel, transport it, and refuel a ship within four hours. *Id.*

11. *Id.* at *4-5. Chenega was a small business concern. The agency and the Small Business Administration concluded that the specifications were ambiguous and impossible. The MARAD, however, alleged that Chenega's solution failed to meet their needs. *Id.*

12. *Id.* at *7. The IFB only called for “an adequate number of tugs of sufficient horsepower.” *Id.*

MARAD that the refueling specification was impossible for any bidder to perform as the MARAD intended.¹⁴ The MARAD confirmed that loading a barge with fuel required more than four hours; the solicitation intended for bidders to load a barge with fuel and transport it to the ships within four hours.¹⁵ Second, “the tug boat specification failed to specify the minimum horsepower or number of tugs a contractor must provide.”¹⁶ The GAO reasoned that “the lack of specificity in the specification provided a compelling basis for canceling the IFB because even if Chenega proposed a method of performance that could meet MARAD’s needs, other prospective bidders were entitled to know the requirements and submit responsive bids based on them.”¹⁷

Follow the Instructions

In *Chenega*,¹⁸ the GAO upheld the agency’s cancellation of an ambiguous specification, but in *C. Lawrence Construction Co. (Lawrence)*,¹⁹ the GAO held that the Department of Labor’s (DOL) IFB was ambiguous and sustained the protest.²⁰ In *Lawrence*, the DOL issued an IFB for construction. The sign specification authorized ASI Sign Systems to provide the signs or a pre-approved manufacturer with an equal product.²¹ The IFB’s “general material and equipment” specification prohibited substitutions unless accompanied by the term “or equal” or

“or approved equal.”²² The “additional instructions” to bidders authorized substitutions for products or manufacturers if the agency approved them before bid opening.²³ Lawrence concluded that the IFB authorized ASI signs only because no other manufacturer’s signs were approved before bid opening, and because the sign specification prohibited substitutions.²⁴ The protester alleged that the specification was unduly restrictive because another manufacturer’s signs could also have met the DOL’s needs.²⁵

The GAO agreed and held that the IFB was reasonably susceptible to Lawrence’s interpretation.²⁶ The DOL argued that the specification authorized an equal product by an alternate manufacturer if approved.²⁷ The GAO disagreed and held that the “additional instructions” were in conflict with the provisions of the “materials and equipment” specification.²⁸ The GAO rejected the arguments that the defect in the specifications did not prejudice bidders, or that the cost of the signs was *de minimis* when compared to the overall contract.²⁹ The GAO found that the \$8000 difference between the agency estimate and ASI’s quote for the signs could affect the bidders’ competitive standing; it recommended that the DOL revise the specifications and re-solicit the IFB.³⁰

13. *Id.* at *4.

14. *Id.* at *7.

15. *Id.* at *4-5. Chenega’s fuel supplier confirmed that the agency’s intent for refueling was impossible. *Id.*

16. *Id.* at *7. Chenega proposed a combination barge and truck refueling service. The MARAD claimed that it intended refueling by barge only. Chenega did not dispute the MARAD’s report that fueling by truck was not the industry standard. *Id.*

17. *Id.* at *7.

18. *Id.* at *1.

19. B-290709, 2002 U.S. Comp. Gen. LEXIS 140 (Sept. 20, 2002).

20. *Id.* at *10.

21. *Id.* at *2. The signs were interior modular and interchangeable. The specification also identified an acceptable ASI product. *Id.*

22. *Id.* at *3.

23. *Id.* at *5. The IFB authorized approval prior to bid opening or after award. The IFB, however, indicated that the agency would not approve requests for approval after award and the contractor would bear the risk of denial. *Id.*

24. *Id.* at *5-6. The specification for signs excluded the terms “or equal” or “or approved equal.” *Id.*

25. *Id.* at *5.

26. *Id.* at *7.

27. *Id.* at *6.

28. *Id.* at *8. The “additional instructions” authorized substitutions if approved by DOL. The “materials and equipment” specification prohibited substitutions when the words “or equal” or “or approved equal” did not accompany the product. *Id.*

29. *Id.* at *9.

The GAO had three occasions to deal with materially unbalanced bids.³¹ In *Ken Leahy Construction, Inc. (Leahy)*,³² the base performance of the Department of Transportation's (DOT) IFB required construction of a roadway and included an option to extend it.³³ The contracting officer exercised the option and awarded the contract to Elte.³⁴ Leahy claimed that Elte improperly front-loaded the cost of mobilization in the base period of the contract. Leahy also alleged that the contracting officer could not exercise the option until he secured all rights-of-way.³⁵

The GAO denied the protest. The GAO found Elte's bid balanced because the "factual predicate for unbalanced pricing—that there be actual costs associated with the performance of the option item—was absent."³⁶ The IFB required the contractor to mobilize only once because the option merely extended the same roadway.³⁷ The GAO held that the IFB did not impose

any conditions precedent, and that no legal impediments precluded the DOT from exercising the option.³⁸

In *L.W. Matteson, Inc. (Matteson)*,³⁹ the GAO sustained the Army Corps of Engineers' (COE) rejection of Matteson's materially unbalanced bid. The COE issued an IFB for dredging and the placement of rock fill in a lake in Wisconsin. The IFB required disposing of dredged material, clearing trees and vegetation, grubbing,⁴⁰ stripping,⁴¹ placing a geotextile underlay, and rock fill.⁴² The contracting officer asked Matteson to verify the contact line item for clearing and grubbing because it was unusually high.⁴³ Matteson responded that it placed the disposal site development cost in the clearing and grubbing line item.⁴⁴ The contracting officer interpreted the contract line item for dredging to include disposal costs and rejected Matteson's bid. The contracting officer reasoned that the contract line item was "excessive, bearing no relation to the actual cost of the clearing and grubbing work, and might constitute an advance payment."⁴⁵

30. *Id.* at *10. The DOL estimated a cost of \$4329 for the signs, while ASI quoted a price of \$12,535.14. *Id.*

31. One prominent treatise explains the term "materially unbalanced" by stating,

There are two aspects to unbalanced bidding—"mathematical unbalancing" and "material" unbalancing. . . . [T]o conclude that a bid is mathematically unbalanced . . . it is necessary to show that a bid contains both understated and overstated prices [M]aterial unbalancing involves an assessment of the cost impact of a mathematically unbalanced bid. A bid is materially unbalanced if there is a reasonable doubt that the acceptance of a mathematically unbalanced bid will result in the lowest ultimate cost to the Government.

JOHN CIBINIC & RALPH C. NASH, FORMATION OF GOVERNMENT CONTRACTS 598 (George Washington University, 3d ed. 1998).

32. Comp. Gen. B-290186, June 10, 2002, 2002 CPD ¶ 93.

33. *Id.* at 1-2. "The base period required construction of approximately 8.6 kilometers of roadway. The option required construction of an additional 3.7 kilometers of the same roadway. The DOT divided the requirements because at the time the it issued the IFB, it failed to secure all the option right-of-ways." *Id.*

34. *Id.* at 2. The DOT secured all but one of the ninety-five rights-of-way. The DOT advised the contracting officer that it would issue the remaining right-of-way within thirty days. *Id.*

35. *Id.* Elte listed \$1,189,290 for the base mobilization line item and one dollar for the option mobilization line item. Leahy also claimed that seven other line items of Elte's bid were unbalanced. The GAO held that the line items were balanced because the items were only 0.3% of Elte's entire bid, and because Leahy's bid for the same line items was lower than Elte's. *Id.*

36. *Id.* at 2-3. See FAR, *supra* note 1, at 14.404-2(g).

37. *Id.* at 3. The IFB precluded payment of more than ten percent of the entire value of mobilization costs prior to completion and acceptance. *Id.*

38. *Id.* The GAO acknowledged that there are instances where it is improper for the agency to include the option to determine the apparent low bidder, but that this was not applicable to this case. See, e.g., *Kruger Constr.*, Comp. Gen. B-286960, Mar. 15, 2001, 2001 CPD ¶ 43. In the third case, *South Atlantic Construction Co.*, Comp. Gen. B-286592.2, Apr. 13, 2001, 2001 CPD ¶ 63, the GAO denied a materially unbalanced bid protest. The U.S. Court of Appeals for the Federal Circuit, in an unpublished opinion, affirmed the Court of Federal Claims' denial of a materially unbalanced protest in *Southgulf, Inc. v. United States*, 30 Fed. Appx. 977 (Fed. Cir. 2002).

39. Comp. Gen. B-290224, May 28, 2002, 2002 CPD ¶ 89.

40. *Id.* at 1. Grubbing is the removal of stumps and large roots. *Id.*

41. *Id.* at 2. Stripping is the removal of surface soil and material. *Id.*

42. *Id.* at 1-2.

43. *Id.* at 2. The clearing and grubbing contract line item was \$298,500; the government estimate was \$1720, but the only other bid for the same CLIN was \$1000. *Id.*

44. *Id.* The contractor claimed to be confused about where to put the cost of developing the disposal site. The GAO held that Matteson's disagreement with the solicitation terms, which only authorized recovery of up-front disposal costs over the life of the project, was untimely. *Id.* at 4.

The GAO agreed with the contracting officer and held that the IFB clearly contemplated disposal costs in the dredging contract line item.⁴⁶ Although the GAO said that its analysis would exclude the agency's advance payment concern, it held that Mattteson's bid "created the potential for Matteson to recover a disproportionate share of the overall contract price early in the performance period."⁴⁷ The GAO also noted that the FAR authorized the COE to reject Matteson's entire bid based on one unbalanced contract line item.⁴⁸

It Wasn't on Time, but It's Not Late

In *J.L. Malone & Associates* (Malone),⁴⁹ the GAO held that receipt of a contractor's bid at the direction of the contracting officer qualified as receipt and control by the government.⁵⁰ The National Aeronautics and Space Administration (NASA) issued an IFB for construction of an electrical substation at the Marshall Space Flight Center (MSFC) in Huntsville, Alabama.⁵¹ The IFB required bid submission by "1:30 on April 9th."⁵² The contracting officer instructed the MSFC construction manager (CM)⁵³ to go to "Gate 9" to receive bids and to act

as a courier for the bids because he was concerned that base security measures might delay bidders. The contracting officer also instructed the CM to remain at the gate until bid opening.⁵⁴ The CM received one bid at 1308 hours, from Garnet Electric Co. (Garnet). The CM called the contracting officer and informed him that he had received the Garnet bid. The contracting officer documented the receipt of Garnet's bid in his notebook. The CM remained at the gate until 1328 hours and delivered the Garnet bid to the contracting officer at 1338 hours, in the bid opening room.⁵⁵ Garnet was the apparent low bidder, but Malone protested the contracting officer's acceptance of Garnet's bid.⁵⁶ Malone claimed that the Garnet bid failed to satisfy the government control exception because a bid received from a contractor at 1308 hours was not receipt and control by the government by 1330 hours. Malone also claimed that the contracting officer considered unacceptable evidence in his analysis of "the propriety of accepting Garnet's bid."⁵⁷

The GAO agreed that the bid was late, but held that the CM filled a purely ministerial task at the direction of the contracting officer, and that the facts failed to cast any doubt on the integrity of the competitive process.⁵⁸ The GAO concluded that the

45. *Id.* at 2.

46. *Id.* at 4. The contract line item for dredging provided "payment . . . for dredging . . . shall include all costs for dredging . . . and . . . disposal." *Id.*

47. *Id.* at 3. The GAO stated that "previous versions of the FAR provided for rejection of unbalanced bids where their acceptance would be tantamount to an adverse payment." *Id.* Because the revised FAR part 15, which discusses unbalanced payments, no longer uses the term "advanced payment" (although the FAR clause used in the IFB did), the GAO considered the risk that Matteson's pricing posed to the government. *Id.*

48. FAR, *supra* note 1, at 14.404-2(f) ("[A]ny bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Unreasonableness of price includes not only the total price of the bid, but prices for individual line items as well.").

49. Comp. Gen. B-290282, July 2, 2002, 2002 CPD ¶ 116.

50. The governing FAR section states,

[A] bid submitted after the exact time specified for receipt of bids is "late" and will not be considered unless it is received before award is made, the contracting officer determines that accepting the late bid would not unduly delay the acquisition; and there is acceptable evidence to establish that it was received at the Government installation designated for receipt of bids and was under the Government's control prior to the time set for receipt of bids.

FAR, *supra* note 1, at 14.303(b)(1)(ii).

51. *J.L. Malone*, 2002 CPD ¶ 116, at 5.

52. *Id.* The IFB required bid submission by 1330 hours on 9 April 2002, at Room 36, Building 4250. Bid opening actually occurred in Room 38. *Id.*

53. *Id.* at 3. R.W. Beck, Inc., was the MSFC construction management and inspection services contractor. The contracting officer directed the R.W. Beck Project Manager (PM) to send an employee to the main gate, Gate 9, at Redstone Arsenal. The PM designated the CM, and the contracting officer instructed the CM. *Id.*

54. *Id.* at 2. Security measures required visitors to pass through military checkpoints and the Visitor and Badging and Registration Office. Visitors accessing the installation required a military or civilian escort. The contracting officer told the CM that he would contact him at 1330 hours and instruct him to return with any bids he received. The PM called the CM at 1328 hours and told the CM to deliver any bids he received to the bid opening room. *Id.*

55. *Id.* at 3. The Garnet representative signed in the gate at 1259 hours. The CM received the bid from the Garnet representative at 1308 hours. The CM gave the Garnet representative his business card with the date and time of bid receipt on the back. The PM called the CM and instructed the CM to return to the bid opening room. The Garnet representative arrived at the bid opening room at 1340 hours. *Id.*

56. *Id.* at 4.

57. *Id.* at 5. Malone alleged that Garnet failed to "allow sufficient time to ensure delivery of its bid to the designated opening room before bid opening." *Id.* Malone claimed that evidence from the contractor did not satisfy the acceptable evidence requirements of FAR 14.304(c). *Id.* at 4.

CM's receipt at 1308 hours was receipt and control by the government.⁵⁹ The GAO also held that the FAR examples of "acceptable evidence" did not exclude other relevant evidence.⁶⁰ The evidence from the contractor that the contracting officer considered was thus relevant and reliable.⁶¹

The Rules Rule, Common Sense Aside

The Court of Federal Claims (COFC) and the GAO had an opportunity to review bid bond responsiveness in *Davis/HRGM Joint Venture v. United States (DHJV)*.⁶² In *DHJV*, a COE contracting officer awarded DHJV a construction contract on 23 May 2001.⁶³ On 7 June 2001, Hess, the second-lowest bidder, claimed that the Davis bid bond was defective because the principal on the bid bond, James G. Davis Construction Co., was different from DHJV, the entity identified in the bid.⁶⁴ The agency dismissed the protest as untimely based on advice from its legal advisor, but on 10 July 2001, the contracting officer terminated the contract and awarded to Hess.⁶⁵ DHJV protested the termination.

The COFC reviewed whether the agency's decision to terminate the DHJV contract was arbitrary, capricious, or in violation of law.⁶⁶ The court held that the bond was defective, and thus, that the bid was nonresponsive. The COFC found that the information in the bid packet failed to establish that the corporation and the joint venture were the same legal entity.⁶⁷ Therefore, the court could not determine that the surety, James G. Davis Construction Co. would be bound to the government if the bidder, DHJV, defaulted. DHJV claimed that the bid bond issue was moot "when the contract was executed and the relevant performance and payment bonds were submitted."⁶⁸ The court, however, ignored the DHJV contract and upheld the award to Hess.⁶⁹

In *Paradise Construction Co. (Paradise)*,⁷⁰ the GAO held that the contracting officer properly rejected a bid that failed to comply with the terms of the IFB. In *Paradise*, the Air Force issued an IFB for sealing four maintenance hanger roofs.⁷¹ The IFB incorporated a FAR provision that holds bidders liable for any procurement costs that exceed the bid amount if the bidder defaults.⁷² *Paradise* submitted a bond that limited the liability to the difference between its bid amount and the amount of

58. *Id.* The GAO recognized that "circumstances may exist where a contracting officer might reasonably find that concerns about the integrity of the process meant control by a contractor employee did not meet the regulatory standard." *Id.*

59. *Id.* at 6.

60. FAR section 14.304(c) lists three examples of acceptable evidence: "the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by the installation, or oral testimony or statements of Government personnel." FAR, *supra* note 1, at 14.304(c). The GAO held that the "clause does not restrict acceptable evidence to the examples listed" and "that reasonable consideration of other relevant information is permissible." *J.L. Malone*, 2002 CPD ¶ 116, at 6.

61. *J.L. Malone*, 2002 CPD ¶ 116, at 6.

62. 50 Fed. Cl. 539 (2001).

63. *Id.* at 541. The DHJV performance and payment bonds submitted were incomplete; the COE returned them to DHJV. The contracting officer allowed DHJV to correct the deficiencies. On 23 May 2001, Hess protested DHJV's omission of total bid prices, but the agency's attorney opined that the omission was "waivable because the total bid amount was ascertainable from the face of the bid." *Id.* at 542. The COE denied the protest on 4 June 2001. *Id.*

64. *Id.* "Hess also claimed the bid bond amount was insufficient: that DHJV was not a pre-qualified bidder under step one of the procurement, and therefore could not compete in the second step." *Id.*

65. *Id.* at 543. The legal advisor determined that the bid bond was defective and recommended termination for convenience unless there was a compelling governmental reason not to do so. The contracting officer accepted the Hess bid on 13 July 2001. *Id.*

66. *Id.* at 546.

67. *Id.* at 548. The issue is

whether the bidder and the bid bond principal are the same legal entity to ensure that the surety will be obligated under the bond to the government in the event that the bidder withdraws its bid within the period specified for acceptance or fails to execute a written contract or furnish required performance and payment bonds.

Id.; see also *Harris Excavating*, Comp. Gen. B-284820, June 12, 2000, 2000 CPD ¶ 103.

68. *DHJV*, 50 Fed. Cl. at 548. The court held that the corporation and the joint venture were separate entities, even though the head of the joint venture signed the bid bond and the SF 1442 listed the same address for the joint venture and the corporation. *Id.*

69. *Id.* at 549. Although the court denied the protest, it concluded that the decision to terminate the contract was "a ridiculous exaltation of bureaucratic punctilio over practicality, contrary to common sense and caused an additional expense of \$312,653 because of the technicality of a bid bond." *Id.*

70. Comp. Gen. B-289144, Nov. 26, 2001, 2001 CPD ¶ 192.

the new contract if it defaulted. The Air Force rejected the bid as nonresponsive, and Paradise protested.⁷³

The GAO denied the protest, holding that a “bid bond is defective if it is submitted in a form that represents a significant departure from the rights and obligations of the parties as set forth in the IFB.”⁷⁴ The IFB required the bidder to be liable “for any cost of acquiring the work that exceeds the amount of its bid.”⁷⁵ The GAO concluded that the Paradise bond was “not available to offset any administrative and other reprourement costs.”⁷⁶ The GAO held that the bid was nonresponsive because the bond significantly diminished the surety and bidder’s obligation.⁷⁷

It’s My Option and I’ll Opt if I Want To

The FAR provides agencies with authority to evaluate bids without evaluating the option if the agency determines that evaluation of the option is not in the agency’s best interest.⁷⁸ In *ACC Construction Co. (ACC)*,⁷⁹ the COE issued an IFB for a

construction contract with five options. The contracting officer decided that it was in the government’s best interest to evaluate the bids without the options⁸⁰ after Army headquarters denied the option funding. The contracting officer awarded to R.C. Construction Co. (R.C.).⁸¹ ACC objected and alleged that the denial of funds required the COE to cancel and resolicit. The GAO held that the COE decision to evaluate prices for award on the base bid only was reasonable and complied with the solicitation.⁸²

You Can’t Make Me Something I’m Not

In *Great Lakes Dredge & Dock Co. (Great Lakes)*,⁸³ the GAO reiterated that “the terms of the solicitation cannot convert a matter of responsibility into one of responsiveness.”⁸⁴ In *Great Lakes*, the COE issued an IFB to dredge ship channels. The IFB offered a disposal facility but authorized any bidder to propose an alternate disposal facility.⁸⁵ The solicitation stated that the COE would reject bids as nonresponsive if they failed to include the required alternate disposal site documents.⁸⁶

71. *Id.* at 1.

72. *Id.* at 1; see FAR, *supra* note 1, at 52.228-1(e) (“[I]n the event the contract is terminated for default, the bidder is liable for any cost of acquiring the work that exceeds the amount of its bid, and the bid guarantee is available to offset the difference.”); see also FAR, *supra* note 1, at 52.228-1(a) (“[A] bidder’s failure to furnish the required bid guarantee in the proper form and amount may be cause for rejection of the bid.”).

73. *Paradise Constr.*, 2001 CPD ¶ 192, at 2.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. See FAR, *supra* note 1, at 17.206(b).

79. Comp. Gen. B-289167, Jan. 15, 2002, 2002 CPD ¶ 21.

80. *Id.* at 3. The governing FAR provision states,

except when it is determined in accordance with FAR 17.206(b) not to be in the Government’s best interest, the government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. Evaluation of options will not obligate the Government to exercise the option(s). . . . The unavailability of funds is an appropriate reason for not evaluating the option prices for award.

FAR, *supra* note 1, at 52.217-5.

81. *ACC Constr.*, 2002 CPD ¶ 21, at 3. The agency originally awarded to R.C. based on the options. R.C. was an eligible HUBZone small business concern and was the low bidder after application of the ten-percent evaluation preference. After the Army denied the COE the option funds, the COE evaluated the bids based on the base requirements. R.C. was the low bidder again, even without the HUBZone preference. *Id.* ACC originally argued that R.C.’s bid was materially unbalanced, that the agency improperly applied the HUBZone preference, that R.C. failed to provide certification of its HUBZone preference, and that R.C. submitted unauthorized facsimile modifications. The GAO held that the HUBZone preference issues and the unbalanced bid arguments were moot after the contracting officer awarded without options. ACC failed to submit a written rebuttal regarding the facsimile bid modifications, but the GAO pointed out that the IFB authorized facsimile bid modifications. *Id.* at 2.

82. *Id.* at 3.

83. Comp. Gen. B-290158, June 17, 2002, 2002 CPD ¶ 100; see also Integrated Prot. Sys., Comp. Gen. B-254475.2, B-254457.3, Jan. 19, 1994, 94-1 CPD ¶ 24; Norfolk Dredging Co., Comp. Gen. B-229572.2, Jan. 22, 1988, 88-1 CPD ¶ 62.

84. *Great Lakes*, 2002 CPD ¶ 100, at 4.

Bean Stuyvesant's (Bean) bid proposed an alternate facility, but failed to include the required information. The contracting officer determined that Bean was the apparent low bidder and planned to award to Bean. Great Lakes protested, arguing that Bean's bid was nonresponsive. The GAO rejected Great Lakes's argument and held that the permit requirement related to "how the contract requirements will be met," which is a

responsibility issue.⁸⁷ The GAO found that the "fact that the IFB called for submission of a permit . . . as of bid opening does not convert the permit requirement into a matter of bid responsiveness."⁸⁸ Therefore, the GAO saw "no merit in Great Lakes' argument that Beans' bid should have been rejected as nonresponsive."⁸⁹ Major Davis.

85. *Id.* at 1.

86. *Id.* at 2. The IFB required bidders proposing an alternate disposal site to submit the site permit with the bid and demonstrate within seventy calendar days from bid opening that the alternate site is operational. *Id.*

87. *Id.* at 3. The contracting officer was determining Bean's responsibility at the time Great Lakes filed its protest. *Id.*

88. *Id.*

89. *Id.*

Negotiated Acquisitions

"Late Is Late" . . . Especially with No Extension

In *Lyons Security Services, Inc.*,¹ the General Accounting Office (GAO) found that the agency properly rejected the protestor's proposal as late, despite the protestor's assertion that the agency had extended the closing date. Under the request for proposals (RFP), the Department of State (DOS) sought to procure security guard services for the U.S. Embassy in Denmark and established 12 February 2002 as the due date for the submission of proposals. Lyons Security Services, Inc. (Lyons Security) submitted a proposal on 20 February, which the DOS rejected as late. Lyons Security challenged the agency's rejection of its proposal, claiming it had received Amendment Number 2 via E-mail, extending the due date for proposals until 22 February.²

In response to the protest, the contracting officer testified that he did not issue or authorize anyone else to issue another amendment. Additionally, he stated that he never considered issuing a second amendment or extending the closing date. For its part, the protestor produced no evidence to support its assertion, claiming it had deleted the E-mail notice of the amendment.³ Unable to retrieve the E-mail, Lyons Security also could not provide the Internet site address of the alleged E-mail or the site from which it downloaded the supposed amendment. Finding no evidence in the record to support the protestor's claim, the GAO denied the protest.⁴

Is It a Technical Evaluation Factor or Not?

In *A.I.A. Construzioni S.P.A.*,⁵ the GAO ruled that failing to submit an Italian *nulla osta* certification statement with its proposal, as required by the RFP, did not render the awardee's pro-

posal non-compliant because the RFP did not convert the requirement from a responsibility matter into a technical evaluation criteria. The RFP, for construction work at the naval air station in Sigonella, Italy, contemplated the award being made without discussions on a "lowest evaluated price" basis.⁶ The RFP also notified offerors that they had to submit a *nulla osta* certification statement with their initial proposals. A *nulla osta* statement, issued by the Italian Chamber of Commerce as part of its certification, indicates the "named contractor has not violated Italian anti-mafia laws, and is eligible to perform on public contracts."⁷

Although Lotos Construzioni S.R.L. (Lotos) submitted the lowest-priced offer, its certification did not include the *nulla osta* statement. The Navy rejected the proposal and awarded to the protestor, A.I.A. Construzioni (AIA). In an agency-level protest, Lotos argued that it should have been allowed to submit the certification at any time before award. "The Navy agreed; deciding the anti-mafia certification was a matter of responsibility, and that it therefore could be submitted up until the time of award."⁸ As a result, the Navy terminated the contract with AIA and awarded to Lotos. AIA protested the award decision.⁹

While the GAO noted that agencies may convert traditional responsibility criteria into technical evaluation criteria in negotiated procurements, it found nothing in this case to indicate that the Navy "intended to convert the *nulla osta* certification into a matter of technical acceptability."¹⁰ Indeed, the RFP specifically listed the certification, of which the *nulla osta* statement was a part, as "other information to be used in the determination of responsibility."¹¹ Consequently, the GAO concluded that the Navy had properly awarded the second contract to Lotos, notwithstanding the requirement that offerors submit the anti-Mafia certification with their initial proposals, because the RFP treated the *nulla osta* statement as information relating to responsibility.¹²

1. Comp. Gen. B-289974, May 13, 2002, 2002 CPD ¶ 84.

2. *Id.* at 2.

3. *Id.* at 1. The contracting officer did post agency responses to offerors' questions and an Amendment Number 1, which corrected a clerical error to the Federal Business Opportunities and Statebuy Internet sites. *Id.*

4. *Id.* at 2. Testimony also established that the contracting officer does not actually post solicitations or amendments to the Internet; only persons within the agency's Office of Procurement Executive have the necessary passwords to post them. Individuals from that office similarly testified that no one from that office had been authorized to post an Amendment Number 2, nor did they post one. *Id.*

5. Comp. Gen. B-289870, Apr. 24, 2002, 2002 CPD ¶ 71.

6. *Id.* at 1.

7. *Id.* at 1-2.

8. *Id.* at 2.

9. *Id.*

10. *Id.* (citing McLaughlin Research Corp., Comp. Gen. B-247118, May 5, 1992, 92-1 CPD ¶ 422, at 4).

11. *Id.* (citing section 18 of the RFP, at 201-6(a)).

In *Marshall-Putnam Soil & Water Conservation District (Marshall-Putnam)*,¹³ the GAO found that an offer that included a “rough floor plan” of the office space it proposed for lease—rather than the architectural elevation and landscape plans specified in the solicitation—was a nonconforming offer. As such, the GAO found that the offer was ineligible for award. In *Marshall-Putnam*, the protestor challenged the award of a U.S. Department of Agriculture (USDA) contract that leased office space from Henry Developers, Inc. (Henry Developers). The protestor claimed that Henry Developers’ proposal did not conform to the terms of the USDA’s solicitation for offers (SFO),¹⁴ which required an architectural plan drawn to scale and elevation drawings.¹⁵ The GAO agreed, noting that without the required information, the agency simply could not have known what it was getting.¹⁶ Ultimately, the GAO said that the fundamental problem was that “the agency improperly made assumptions about the building that Henry proposed—and concluded that it not only satisfied the government’s needs, but warranted a nearly perfect technical score—with no evidence before it of the actual features of the building being proposed.”¹⁷

Reviewing the same facts arising out of the same Navy RFP, the GAO and the Court of Federal Claims (COFC) reached completely opposite conclusions. In *Metcalf Construction Co.*,¹⁸ the GAO ruled that the agency properly eliminated Metcalf Construction Company’s (Metcalf) proposal from further consideration because its price for one line item exceeded the cost limitation set forth in the RFP. On appeal, however, the COFC found the solicitation provision addressing “cost limitations” ambiguous and determined that the Navy failed to treat all offerors fairly by not notifying all of them of the intended meaning of the provision.¹⁹

The facts of the case arose out of a Navy RFP for the design and construction of military family housing units at the Marine Corps Base in Kaneohe Bay, Hawaii. The solicitation schedule contained three separate line items—one Base and two Options—relating to three separate projects that spanned three separate fiscal years. Included in the RFP was a provision establishing “cost limitations” or a “budget ceiling” for the separate scheduled line items.²⁰ Three offerors submitted initial proposals before the RFP closing date—Metcalf, Lend Lease Actus, and an unnamed offeror (Offeror A). Following a round of discussions, the Navy requested final proposal revisions (FPR). A day after receipt of the FPRs, the Navy amended the RFP to include an updated Davis-Bacon Act wage determination, and as a result, a request for a second round of FPRs. In response, Metcalf submitted a final revised price for Option 0002 that exceeded the budget ceiling established in the RFP for that line item. The Navy then eliminated Metcalf’s proposal from further consideration and ultimately awarded the contract

12. *Id.* at 2-3.

13. Comp. Gen. B-289949, B-289949.2, May 29, 2002, 2002 CPD ¶ 90.

14. *Id.* at 4-5. The GAO noted that while both the agency and protestor used the terms “bid” and “nonresponsive” in reference to the SFO at issue, the SFO was essentially an RFP and the GAO applied the standards applicable to negotiated procurements. *Id.*

15. *Id.* at 3.

16. *Id.* at 6.

17. *Id.* at 7. The GAO recommended that the agency hold discussions, request revised proposals from Henry Developers and the protestor, reevaluate the proposals, and make a new source selection decision based on the reevaluation. *Id.* at 8.

18. Comp. Gen. B-289199, Jan. 14, 2002, 2002 CPD ¶ 31.

19. *Metcalf Constr. Co. v. United States*, 53 Fed. Cl. 617, 629-30 (2002).

20. *Metcalf Constr.*, 2002 CPD ¶ 31, at 2. Specifically, the provision stated:

1A.7 INFORMATION CONCERNING COST LIMITATIONS: The budget ceiling for the award of this contract is as follows:

Base Item: \$7,3000,000 for Project H-570 (30 units)

Option 0001: \$35,780,000 for Project H-571 (158 units)

Option 0002: \$5,400,000 for projects H-571 and H-563 (24 units)

Proposals in excess of this amount will *not* be considered. Offerors should prepare their proposals so as to permit award at a price within the cost limitation.

Id.

to Lend Lease Actus, whose offer was technically equivalent but lower priced than Offeror A's.²¹

Metcalf first protested to the GAO, arguing that RFP Section 1.7A provided for the elimination of a proposal only when the total evaluated price exceeded the sum of the base item and both options.²² In support of its interpretation, Metcalf noted the RFP's singular language (i.e., "this amount," instead of "these amounts," and "the cost limitation," instead of "the cost limitations") concerning the budget ceilings.²³ In an attempt to bolster the reasonableness of its interpretation, Metcalf contended that Offeror A interpreted the same language under section 1.7A similarly, and that an agency contract specialist "acknowledged the reasonableness of this interpretation."²⁴

While recognizing "that the language of section 1A.7 is somewhat confusing," the GAO nevertheless concluded "that the provision is susceptible of only one reasonable interpretation: it imposes a separate budget ceiling on each line item and excludes from consideration any proposal offering a price in excess of any of the budget ceilings."²⁵ In reaching its conclusion, the GAO cited the RFP's separate listing of each of the budget ceilings for the three line items. It also noted that because the initial award price covered only the base item work, the instruction to prepare proposals to permit award at a price within the budget ceiling "makes sense only if the solicitation is interpreted as imposing separate line item cost limitations."²⁶

The GAO also rejected Metcalf's argument that Offeror A and an agency contract specialist had similarly misinterpreted Section 1A.7. The GAO determined that the issue Offeror A raised actually related to the language in Section 1B.8,²⁷ which the Navy had recognized as susceptible to misinterpretation. The Navy, however, amended this language before Metcalf

submitted the FPR that contained the price in excess of the established budget ceiling for the line item.²⁸

The GAO also rejected Metcalf's arguments that the agency should have reopened discussions to allow it to revise its price for Option 0002, and that the Navy conducted "unequal discussions" by informing Offeror A to review its prices to ensure it did not violate the ceilings on the separate line items without doing the same for Metcalf.²⁹ Recognizing that the decision to reopen discussions falls within the discretion of the contracting officer, the GAO found that the contracting officer did not abuse her discretion, noting that the agency had "already gone through two rounds of FPRs, and we see no basis to require the reopening of discussions here."³⁰ Further, while the Navy informed Offeror A that two of its prices exceeded the budget ceilings during the initial round of discussions, Metcalf's prices at that time were all under the limitations and therefore there "simply was no reason for the agency to reiterate this requirement or otherwise to discuss budget ceilings during discussions with Metcalf."³¹

Unhappy with the GAO's conclusions and the denial of its protest, Metcalf filed suit at the COFC, advancing very similar arguments, but with very different results. The court noted that while the COFC is not bound by GAO decisions, it generally grants some deference to the GAO's opinions. In this case, however, the court elected not to defer to the GAO because the contract interpretation matter in issue "is a question of law for the court to decide" and "the GAO's finding in favor of the Navy is unsupported on this record."³²

Applying the "well-established" rules of contract interpretation, the COFC determined that the RFP's language at Section 1A.7 created a patent ambiguity. The court concluded that the

21. *Id.* at 3.

22. *Id.* at 3-4.

23. *Id.* at 4.

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 2. Section 1B.8, concerning the evaluation of prices, provided in part: "For award purposes, the price for pre-priced Options 0001 and 0002 will be added to the Item 0001 price." *Id.*

28. *Id.* at 4-5. In the contracting specialist's view, the language of Section 1B.8 "could be construed as a 'total' budget ceiling [rather than] an individual line item budget ceiling." *Id.* at 4 (quoting a 4 June 2001 memorandum from the contract specialist to the Source Selection Board). As a result, the contracting specialist recommended the inclusion of Offeror A in the competitive range and the amendment of RFP's Section 1B.8, to substitute the word "evaluation" for "award." *Id.* at 4-5.

29. *Id.* at 5.

30. *Id.* (citing *Mine Safety Appliances Co., Comp. Gen. B-242379.5*, Aug. 6, 1992, 92-2 CPD ¶ 76, at 6).

31. *Id.*

32. *Metcalf Constr Co. v. United States*, 53 Fed. Cl. 617, 626 n.17 (2002) (citing *E.W. Bliss Co. v. United States*, 33 Fed. Cl. 123, 134 (1995), *aff'd*, 77 F.3d 445 (Fed. Cir. 1996)).

Navy, having notice of the defect, failed to inform all offerors of the ambiguity adequately.³³ The court based its finding of an ambiguity on a “probative” comment by the contract specialist in the memo to the SSB, that the language at Section 1B.8 “could be construed as a ‘total’ budget ceiling vice an individual line item budget ceiling.”³⁴ Referencing the contract interpretation rule that the plain and ordinary meaning of a contract must produce an interpretation “that would be derived ‘by a reasonably intelligent person acquainted with the contemporary circumstances,’”³⁵ and assuming that the contract specialist was such a person, the court stated that “the concept of *res ipsa loquitor*, by analogy, concludes our analysis.”³⁶ In addition to the contract specialist’s comments, the court found “an obvious inconsistency” in Section 1A.7 where the agency used singular language (e.g., “budget ceiling,” “this amount,” and “cost limitation”), but listed the three different line items separately.³⁷

Finding the contract language patently ambiguous, the COFC next determined that the Navy had notice of the ambiguity both before the closing date, by way of Offeror A’s question about “how the budget items were to be construed,” and later, when Offeror A submitted its initial proposal with prices that exceeded two separate budget ceilings.³⁸ Looking to Federal Acquisition Regulation (FAR) section 14.208(c)³⁹ for guidance, the court concluded that while the Navy “clearly and distinctly” instructed Offeror A of its interpretation of the ambiguous pro-

vision during the first round of discussions, it did not “do the same for the other bidders.”⁴⁰

The court also concluded that the Navy treated offerors unfairly when, after the receipt of the initial proposals, it specifically informed Offeror A not to exceed the budget ceilings, but simply eliminated Metcalf from further consideration when its final proposal included a price above the budget ceiling.⁴¹ Dismissing the Navy’s claim that the contracting officer reasonably concluded that yet another round of discussions was unnecessary, the court stated that “one more clarifying statement would have only enhanced the quality of the procurement process, and served the interest of (1) fairness, when another bidder had received a prior warning, and (2) competition, when there were only a total of three bidders under consideration.”⁴² The COFC, concluding that the Navy unreasonably excluded Metcalf’s proposal from further consideration, stated that while Offeror A “received only a hospitable warning when it exceeded two of the budget ceilings, . . . Metcalf was held to the strict letter of the [Navy’s interpretation of the] solicitation.”⁴³

While It May Be an E-Mail, It’s Still “Informal Advice”

While oral advice that conflicts with an agency solicitation does not bind the government,⁴⁴ until this past year, neither the GAO nor the COFC had determined whether government E-

33. *Id.* at 629-30.

34. *Id.* at 629.

35. *Id.* at 628 (quoting *Rice Lake Contracting, Inc. v. United States*, 33 Fed. Cl. 144, 152 (1995)).

36. *Id.* at 630.

37. *Id.* The court also had some rather harsh words for the GAO’s earlier decision: “What is utterly perplexing to this court is the fact the GAO found that: ‘While [it] recognize[s] that the language of section 1A.7 is *somewhat confusing*, [it] nonetheless think[s] that the provision is susceptible of only *one reasonable interpretation*’ To so conclude, in this court’s view, strains credulity.” *Id.*

38. *Id.* at 631.

39. The FAR states:

[A]ny information given to a prospective bidder concerning an invitation for bids shall be furnished promptly to all other prospective bidders as an amendment No award shall be made on the invitation unless such amendment has been issued in sufficient time to permit all prospective bidders to consider such information in submitting or modifying their bids.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 14.208(c) (July 2002) [hereinafter FAR].

40. *Metcalf Constr. Co.*, 53 Fed. Cl. at 632.

41. *Id.* at 634-35.

42. *Id.* at 635.

43. *Id.* at 643. While the GAO did not address the issue, the COFC also found that the Navy acted arbitrarily when it ranked Metcalf third technically among the three proposals. Although each of the proposals received the same adjectival rating (“acceptable”), the Navy ranked Metcalf third due to certain advantages in the other proposals. While recognizing that proposals with the same adjectival rating are not necessarily of equal quality, and that an agency may consider specific advantages, the court nevertheless found no “comparative weaknesses” between the proposals in the record as the Navy claimed. *Id.* at 641. Finding that Metcalf met the showings for permanent injunctive relief, the COFC declared the Navy’s contract with Land Lease Actus null and void and permanently restrained and enjoined further performance under the contract. The COFC further ordered the reinstatement of Metcalf in the competitive range, the amendment of the solicitation to clarify Section 1A.7, the re-submission of final proposals, and re-evaluation consistent with the court’s findings. *Id.* at 646.

mail advice binds an agency. In *Diamond Aircraft Industries, Inc. (Diamond Aircraft)*,⁴⁵ the GAO determined that even if the agency E-mails the informal advice, the result is the same—an offeror relies upon such agency advice at its own risk, and it does not bind the government. In *Diamond Aircraft*, the Air Force issued an RFP for motorized gliders, spare parts, and support equipment. In a commercial item acquisition that provided for the selection of the lowest priced technically acceptable proposal, the solicitation stated that the agency would evaluate the motorized gliders on a pass-fail basis, depending upon their ability to satisfy fourteen minimum requirements.⁴⁶ In evaluating Diamond Aircraft's proposal, the Air Force determined that the offered motorized glider, powered by a 100-horsepower (hp) engine, failed to meet five of the minimum requirements; the Air Force thus rejected the proposal.⁴⁷

Diamond Aircraft alleged that the Air Force misled it into submitting a technically unacceptable proposal. At the time the Air Force issued the RFP, Diamond Aircraft manufactured a motorized glider with an 81-hp engine, which met all of the solicitation's minimum technical requirements. Diamond Aircraft, however, was in the process of upgrading the glider to add a 100-hp engine. Because the commercial item solicitation required the glider to meet the specified minimum requirements, and because the 100-hp glider was not certified or in production, Diamond Aircraft E-mailed the Air Force and asked whether it should submit alternative offers. According to Diamond Aircraft, the Air Force's E-mail response "advised that the 100-hp version would be acceptable, and instructed it to submit only one offer, for the 100-hp version."⁴⁸

The GAO noted the general rule that oral advice that conflicts with the solicitation is not binding on the government. Because the solicitation notified offerors that proposals would be evaluated against "specific requirements," the GAO ruled that while the Air Force response to Diamond Aircraft's query was in the form of an E-mail, "[n]o informal advice—oral, or otherwise—could change this basis for evaluation, since the advice would not amend the solicitation."⁴⁹ The GAO advised Diamond Aircraft that instead of relying upon the Air Force's E-mail advice, it should have requested an amendment to the solicitation if it believed the RFP required clarification, so that all offerors could compete equally.⁵⁰

CAFC Adds Voice to "Cost" Discussions

The Court of Appeals for the Federal Circuit (CAFC) added its voice to the GAO's⁵¹ and ruled that FAR section 15.306(d)(3)⁵² does not automatically require a contracting officer to enter into cost discussions with offerors whose cost proposals the agency deems adequate. In *JWK International Corp. v. United States*,⁵³ the Navy issued an RFP for supply acquisition logistics management integration services. The RFP listed the evaluation factors as technical, management, past performance, and cost, with cost being the least important evaluation criterion. Following the receipt of initial proposals, the Navy entered into discussions with the only two firms to submit offers—JWK International Corp. (JWK), the incumbent, and LTM Incorporated (LTM), the eventual awardee. While the Navy discussed the weaknesses in their proposals with both bidders, the Navy did not discuss cost with either

44. See, e.g., *Input/Output Tech., Inc.*, B-280585, B-280585.2, Oct. 21, 1998, 98-2 CPD ¶ 131.

45. Comp. Gen. B-289309, Feb. 4, 2002, 2002 CPD ¶ 35.

46. *Id.* at 1.

47. *Id.* at 2.

48. *Id.*

49. *Id.* (citing *Input/Output*, 98-2 CPD ¶ 131, at 5).

50. *Id.* In addition to concluding that the informal E-mail advice provided no basis for reopening the competition, the GAO disagreed with Diamond Aircraft's interpretation of the Air Force's advice. Reviewing the text of the E-mails in question, the GAO could find no references to the technical acceptability of the 100-hp engine—the E-mails referred only to whether the 100-hp version "would be considered to be a commercial item." *Id.* at 3.

51. See, e.g., *SOS Interpreting, Ltd.*, Comp. Gen. B-287477.2, May 16, 2001, 2001 CPD ¶ 84 (holding that the agency was not required to discuss price when it did not consider price to be a significant weakness).

52. At the time of the appeal, FAR section 15.306(d)(3) stated:

The contracting officer shall . . . discuss with, each offeror still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussions are a matter of contracting officer judgment.

GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 15.306(d) (June 2001) [hereinafter 2001 FAR].

53. 279 F.3d 985 (Fed. Cir. 2002).

party because both received an “adequate” rating with respect to cost.⁵⁴

After receiving and evaluating the revised proposals, the Navy awarded the contract to the higher priced offeror, LTM, based on LTM’s superior non-cost factor ratings. JWK sued in the COFC, which granted the government’s summary judgment motion and rejected JWK’s argument that the Navy had failed to engage in “meaningful discussions” when it did not discuss cost.⁵⁵

On appeal, JWK argued that FAR section 15.306(d)(3) required the Navy to hold cost discussions, even though the cost of the proposal was not a significant weakness or deficiency because cost is always a material factor, and adjusting cost will “always materially enhance a proposal’s potential for award.”⁵⁶ The CAFC, however, agreed with the COFC and rejected JWK’s argument. The CAFC began by explaining that agencies determine the relative importance of the cost and non-cost evaluation factors in a solicitation. Under the current RFP, the CAFC noted, the Navy decided that the non-cost factors, when combined, were significantly more important than cost. Because agencies must consider both non-cost and cost factors and have the discretion to rank their relative importance, the CAFC continued, “a downward adjustment may not always affect award.”⁵⁷ The court further observed that under FAR section 15.306(d)(3), the determination of whether to hold discussions falls within the contracting officer’s discretion. In fact, “aside from areas of significant weakness or deficiency, the contracting officer need not discuss areas in which a proposal may merely be improved.”⁵⁸ Here, since the contracting officer determined that JWK’s (and LTM’s) cost proposal was acceptable (and not an area of weakness) the Navy was not required to include cost in its discussions.⁵⁹

FAR Change “to Clarify” Mandatory Discussions

A final rule, effective 19 February 2002, amended FAR section 15.306(d) to “clarify” that contracting officers are “not required to discuss every area where the proposal could be improved.”⁶⁰ Under the amended language, contracting officers “must . . . discuss . . . deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had the opportunity to respond.”⁶¹ The previous rule also required contracting officers to discuss “other aspects of the offeror’s proposal” that could be “altered or explained to materially enhance the proposal’s potential for award.”⁶² By way of contrast, the new rule merely “encourages” contracting officers to discuss such matters, making it “clear that whether these discussions would be worthwhile is within the contracting officer’s decision.”⁶³

Call It What You Want, but It’s Still “Discussion”

In determining whether an agency has engaged in “discussions” with an offeror, the GAO continues to focus on whether the offeror had an opportunity to revise its proposal; the characterization an agency attaches to the communication is irrelevant. In *Priority One Services, Inc.*,⁶⁴ the protestor challenged the award of a National Institute of Allergy and Infectious Disease (NIAID) contract to SoBran Incorporated (SoBran), under an RFP for the care, treatment, and other technical skills related to the scientific study of animals. The solicitation contemplated a cost-plus-fixed-fee contract and provided that award would be made based on the “best overall value” to the government, with all non-cost-evaluation factors, when combined, being significantly more important than price.⁶⁵

54. *Id.* at 987.

55. *See* JWK Int’l Corp. v. United States, 49 Fed. Cl. 364, 367 (2001).

56. *JWK*, 279 F.3d at 987-88.

57. *Id.* at 988.

58. *Id.*

59. *Id.* The CAFC added that to prevail in its bid protest, JWK had to show that the Navy’s failure to conduct a cost discussion was a significant error that prejudiced award. Despite JWK’s argument that had the contracting officer discussed price, it could have adjusted its proposal and offered a lower price, the CAFC again noted that cost was the least important criterion. The CAFC added that JWK’s proposed costs were already lower than the awardee’s and that the contracting officer had determined that LTM’s superior non-cost ratings outweighed the slight cost difference between the two proposals. *Id.*

60. Federal Acquisition Regulation; Discussion Requirements, 66 Fed. Reg. 65,368 (Dec. 18, 2001) (codified at 48 C.F.R. pt. 15 (2002)); *see* Ralph C. Nash & John Cibinic, *Postscript IV: Negotiation in a Competitive Situation*, 16 NASH & CIBINIC REP. 2, ¶ 8 (2002) (providing a brief but “meaningful” discussion of the history of FAR section 15.306(d), GAO decisions concerning the scope of discussions, and the impact of the most recent change).

61. 66 Fed. Reg. at 65,368.

62. 2001 FAR, *supra* note 52, at 15.306(d)(3).

63. 66 Fed. Reg. at 65,368.

64. Comp. Gen. B-288836, B-288836.2, Dec. 17, 2001, 2002 CPD ¶ 79.

Following written discussions and evaluation of the FPRs, the evaluation team decided to award to SoBran. But before the evaluation team completed a formal written recommendation, it requested “further clarification/information from SoBran.”⁶⁶ In a subsequent telephone call to SoBran that the source selection document characterized as a “[c]larification,”⁶⁷ the agency questioned the availability of certain key personnel, as well as the proposed salaries for the quality assurance trainers. SoBran responded by revising its technical and price proposal, which resulted in an increase in its proposed costs.⁶⁸ After receiving this information, the NIAID awarded the contract to SoBran.⁶⁹

The protestor claimed that the NIAID’s communications with SoBran after tentative selection constituted “discussions,” requiring discussions with all offerors remaining in the competitive range.⁷⁰ The GAO agreed, declaring that the parties’ actions, not the agency’s characterization, control the determination of whether they have held discussions. Applying what it termed the “acid test” for determining whether an agency’s communications constitute “discussions,”⁷¹ the GAO found that the communications here were in fact “discussions.”⁷² To the GAO, it was clear that the NIAID had afforded SoBran the opportunity to revise its technical and cost proposals in response to the NIAID’s concerns and questions after the receipt of the FPRs; therefore, the communications constituted discussions.⁷³

Submission of Omitted Proposal Information Not a Clarification

In *eMind*,⁷⁴ the GAO held that the submission of omitted information after the closing date for the receipt of proposals is

not an allowable clarification when the omitted information is necessary to determine the technical acceptability of the proposal. The basis for eMind’s protest was the rejection of its proposal as technically unacceptable under an Internal Revenue Service (IRS) RFP for off-the-shelf computer-based tax law and accounting courses. The solicitation instructed offerors to submit course descriptions for the courses identified in the schedule, which the agency would use to determine the technical acceptability of proposals. The RFP also advised offerors that the agency intended to award without discussions.⁷⁵

After the closing date for proposals, the contracting officer contacted eMind by telephone to inform it that some of the course names eMind had provided in its schedule did not match the names in the proposal’s course catalog section. In an E-mail response, eMind furnished the correct course names. In a subsequent E-mail that same day, eMind provided six course descriptions that it had omitted from its proposal.⁷⁶

During the evaluation phase, the agency evaluation team gave eMind’s technical proposal a “fail” rating for the most important technical factor, “Fulfillment of Statement of Work Minimum Requirements.”⁷⁷ Because eMind’s proposal omitted course descriptions for thirteen line items, the evaluators could not determine if eMind’s proposed courses satisfied the RFP’s minimum requirements. While eMind had provided six additional course descriptions via E-mail, the evaluators determined that consideration of these descriptions would be improper because the agency received them after the RFP’s closing date.⁷⁸ The team also determined that the majority of descriptions provided failed to meet the RFP’s requirements. The agency found eMind’s and a third proposal technically unacceptable and awarded to MicroMash.⁷⁹

65. *Id.* at 2.

66. *Id.* (quoting the Agency Report, Tab XIII, Source Selection Determination, at 2).

67. *Id.* at 5 (quoting the Agency Report, Tab XIII, Source Selection Determination, at 2).

68. *Id.*

69. *Id.* at 2.

70. *Id.* at 5.

71. *Id.* at 5 (citing Raytheon Co., Comp. Gen. B-261959.3, Jan. 23, 1996, 96-1 CPD ¶ 37, at 11).

72. *Id.* at 6. The NIAID argued that the Health and Human Services Acquisition Regulations, 48 C.F.R. § 315.670 (2002), permitted it to hold “limited negotiations” with the selected offeror. The GAO disagreed, finding that the regulation limited such negotiations “to matters that would have no impact on the award decision and which do not prejudice the competitive interests or the rights of other offerors,” unlike the situation here. *Priorities One Servs.*, 2002 CPD ¶ 79, at 6 n.8.

73. *Id.* at 4. The protestor had also challenged the award on the grounds that the NIAID failed to conduct a reasonable cost-realism analysis. The GAO agreed and sustained the protest on this basis as well. *Id.*

74. Comp. Gen. B-289902, May 8, 2002, 2002 CPD ¶ 82.

75. *Id.* at 1-2.

76. *Id.* at 3.

77. *Id.*

In its protest, eMind claimed that the IRS should have considered the course descriptions it had submitted via E-mail, arguing that this information was “an allowable clarification of its proposal since the course descriptions were taken directly from its website and were not developed or modified after the proposal closing date.”⁸⁰ The GAO disagreed. Referencing the FAR’s definition of “clarifications,”⁸¹ the GAO firmly stated that clarifications “may not be used to furnish information required to determine the technical acceptability of a proposal.”⁸² Because agencies can only evaluate offers based on the information actually provided in a proposal, the GAO rejected eMind’s suggestion that the IRS was somehow put on notice of its capabilities because its course descriptions were on its Web site. Furthermore, there was nothing in eMind’s proposal suggesting that the Web site course descriptions were incorporated by reference.⁸³

GAO Finds Unequal Treatment in Past Performance Trade-Off Decision

In late 2001, the GAO found an award decision unreasonable, based on the agency’s unequal treatment in assessing the past performance of the protestor and the awardee. In *Myers Investigative & Security Services, Inc.*,⁸⁴ the protestor challenged the award of a General Services Administration (GSA) ten-month interim contract⁸⁵ for security guard services to Industrial Loss Prevention, Inc. (ILP). The RFP contemplated the award on a “best value to the Government” basis and included “past performance” as one of two technical factors that, when combined, were more important than price.⁸⁶ Con-

cerning past performance, the RFP required offerors to submit references for all current security guard service contracts as well as for any similarly sized contracts performed within the previous five years. The RFP also provided that such information and any other past performance information known to the agency would form the basis for the agency’s evaluation.⁸⁷

Assessing the past performance of all offerors, the Source Selection Technical Evaluation Board (SSTEB) gave ILP the highest past performance ranking, while Myers Investigative and Security Services, Inc. (Myers) received the third-highest rating. Although ILP had the third-highest priced proposal and Myers had the lowest overall price, the SSTEB recommended award to ILP based on its superior past performance.⁸⁸ Myers protested, arguing that the agency’s past performance evaluation was unreasonable and unfair.⁸⁹

The GAO agreed with Myers, sustaining the protest and finding several problems in the past performance evaluation and selection procedures. First, the underlying reference responses failed to support numerous conclusions in the SSTEB Report.⁹⁰ Second, the source selection decision varied from the evaluation scheme contemplated in the RFP. Specifically, while the RFP advised offerors that the agency would consider any information on any guard services performed in the past five years, that information “played no discernable role in the selection decision.”⁹¹ Instead, the SSTEB’s selection recommendation considered only information from Myers’s and ILP’s prior contracts with the GSA. Finally, and most importantly, the GAO found that the SSTEB’s past performance evaluation treated Myers and ILP unequally, given the similarities

78. *Id.*

79. *Id.* at 4.

80. *Id.*

81. FAR, *supra* note 39, at 15.306(a)(1) (defining clarifications as “limited exchanges, between the Government and offerors, that may occur when award without discussions is contemplated”).

82. *eMind*, 2002 CPD ¶ 82, at 5.

83. *Id.* (referencing *Microcosm, Inc.*, Comp. Gen. B-277326, Sept. 30, 1997, 97-2 CPD ¶ 133, at 6-7).

84. Comp. Gen. B-288468, Nov. 8, 2001, 2001 CPD ¶ 189.

85. The ten-month interim contract at issue was a “stopgap” contract to allow the GSA to take corrective action on the award of a five-year statewide contract for security guard services, which was to replace the previous five-year contract performed by the protestor. *Id.* at 2. A thirty-day “stopgap” contract, performed by the protestor, and a sixty-day interim contract, performed by ILP, preceded the ten-month interim contract that was the subject of this protest. *Id.*

86. *Id.* (referencing RFP sections F-3 and M-2).

87. *Id.*

88. *Id.* at 3.

89. *Id.* at 4.

90. *Id.* at 5.

91. *Id.* at 7.

in the underlying information upon which the agency ultimately based its conclusions.⁹² For example, while each firm had a similar number of complaints about tardy guards and guards abandoning their posts, the GSA ranked Myers's past performance significantly lower than ILP's.⁹³ Given this unequal treatment, and in light of the other problems identified, the GAO found the evaluation unreasonable and sustained the protest.⁹⁴

Contractor with Relevant Past Performance That Is Unavailable Gets "Neutral" Rating

In *Chicataw Construction, Inc.*,⁹⁵ the GAO approved the contracting officer's decision to give a "neutral" rating to an offeror that had some past performance information, but not as much as the solicitation requested. The GSA had sought offers for the replacement of a cooling tower in a federal building. The solicitation advised that the award would be on a "best value" basis, considering price and past performance. It stated that the two factors were about equal in weight, but that as proposals became more equal in past performance, the agency would give price greater weight. Concerning past performance, the GSA apparently wanted a minimum of three references for work completed as a prime contractor within the previous five years.⁹⁶

Chicataw Construction, Inc. (Chicataw) submitted five references with its proposal, but the GSA only scored two of the references provided. The contracting officer excluded two of the references because one was too stale and the other was for work as a subcontractor. The contracting officer did not consider the third reference because the contracting officer was unable to make contact with the reference, despite repeated attempts. The agency scored Chicataw's other two references at 4.75 and 3.5 on a five-point scale. Because the solicitation

required a minimum of three references and Chicataw did not identify an additional reference, the contracting officer averaged the two ratings with a third score of zero, resulting in an overall past performance score of 2.75.⁹⁷ Although Chicataw offered the lowest overall price, the contracting officer determined that it did not offer the "best value" to the government given its significantly lower past performance rating.⁹⁸

In a supplemental report following Chicataw's initial protest, the GSA recognized errors in the evaluation process and recalculated Chicataw's past performance rating, substituting a "neutral" rating of 2.5 for the previous score of zero. This resulted in a new overall average of 3.58 for Chicataw.⁹⁹ Nevertheless, the contracting officer determined that the original awardee, Hammond Corporation, represented the "best value" to the government, based on its slightly higher price but significantly higher past performance rating of 4.96.¹⁰⁰

Challenging the agency's evaluation of its past performance, Chicataw argued that the GSA violated FAR section 15.305(a)(2)(iv)¹⁰¹ by initially giving it a zero rating for the unavailable project reference. While the GAO stated that it was "not entirely clear" whether FAR section 15.305(a)(2)(iv) applied in a case where the protestor had provided some—but not all—the past performance information requested, the GAO disagreed with Chicataw's contention. The GAO found nothing "unreasonable" in the GSA's use of this principle when it recalculated Chicataw's past performance rating using a "neutral" rating of 2.5 for the unavailable reference.¹⁰²

Chicataw further asserted that the GAO should give "little deference" to the agency's revised evaluation under the *Boeing Sikorsky Aircraft Support*¹⁰³ line of cases.¹⁰⁴ Contrasting the agency's reevaluation here with that in *Boeing Sikorsky*, the GAO held that the GSA's reevaluation was "less a matter of judgment, and more a matter of mathematics."¹⁰⁵ Here, the

92. *Id.*

93. *Id.* at 7-8.

94. *Id.* at 9. The GAO recommended that the agency reopen evaluation of proposals, prepare a new evaluation report, and make a new source selection decision, "taking care to explain any benefits associated with the tradeoff decision." *Id.* at 11.

95. Comp. Gen. B-289592, B-289592.2, Mar. 20, 2002, 2002 CPD ¶ 62.

96. *Id.* at 1-2. The solicitation contained conflicting provisions regarding past performance. One section required at least three references, but no more than six; another section required a minimum of six references. *Id.* at 2.

97. *Id.* at 3.

98. *Id.* at 4.

99. *Id.* at 4-5.

100. *Id.* at 5.

101. *Id.* "In the cases of an offeror without a record of relevant past performance or for whom information is not available, the offeror may not be evaluated favorably or unfavorably on past performance." See FAR, *supra* note 39, at 15.305(a)(2)(iv).

102. *Chicataw Constr.*, 2002 CPD ¶ 62, at 5.

agency properly determined that the initial zero rating was inappropriate, assigned a “neutral” rating for the unavailable reference, and then recalculated the average past performance score—“a straightforward computation that raises fewer concerns than when we might have when an agency is revisiting matters that are entirely discretionary.”¹⁰⁶

Be Careful How You Evaluate

In *Gemmo Impianti SpA*,¹⁰⁷ the GAO sustained a protest when it found material defects in the agency’s evaluation of two of the solicitation’s three technical factors, as well as an erroneous assumption concerning the difference in price between proposals during the cost-technical tradeoff analysis.¹⁰⁸ Under the terms of the RFP, the Navy contemplated award of a contract for various installation services in Naples, Italy, based on a “best value determination.”¹⁰⁹ The RFP also listed three technical factors—past performance, corporate capability, and quality control—which when combined were of equal importance to price. After evaluating the proposals, the source selection board (SSB) summarized the evaluation team’s findings. The SSB noted the extensive experience of Penauillie Italia SpA (Penauillie) and the “superior” ratings it received from references, including two based on major contracts in Paris, France.¹¹⁰ Additionally, the SSB noted that Penauillie’s proposal included a “highly detailed” quality control plan and increased staffing, compared to the protestor’s plan, which “appear[ed] minimal.”¹¹¹ The SSB assigned a quantitative value to the benefit of Penauillie’s increased staffing and subtracted the cost of the additional staffing from the price difference between the higher priced Penauillie proposal and that of

the protestor. Based on this analysis, the SSB determined that the actual price difference between the two proposals was only “marginal,” and concluded that Penauillie’s “superior” proposal represented the best value to the government.¹¹²

The GAO agreed with the protestor that the evaluation and source selection decision were unreasonable and unfair. First, under the past performance factor, the GAO found the Navy improperly credited Penauillie with performance of the two Paris contracts, when in fact it had been performed by a different corporate entity of a shared corporate parent.¹¹³ In determining whether to attribute such past performance, the GAO stated the “affiliation” is not the only consideration, “but also the nature and extent of the relationship between the two—in particular, whether the proposal demonstrates that the workforce, management, facilities, or other resources of the affiliate may affect contract performance by the offeror.”¹¹⁴ While Penauillie claimed that it shared top-level management personnel with its affiliate, its proposal made no mention of the personnel involvement on the contract and thus provided no basis for the Navy to consider the affiliate’s past performance.¹¹⁵

The GAO also took issue with the agency’s evaluation of the quality control factor. While the GAO agreed that Penauillie proposed using twice the number of quality control personnel as the protestor, it found that Penauillie’s representatives devoted only fifty percent of their time to quality control, while the protestor’s quality control representatives generally worked full-time. Thus, the actual difference in total labor hours was far less significant than the agency’s assessment had reflected.¹¹⁶ Finally, the GAO found the agency’s calculation deducting the salaries of the increased number of quality con-

103. Comp. Gen. B-277263.2, B-277263.3, Sept. 29, 1997, 97-2 CPD ¶ 91, at 15 (stating the GAO’s skepticism of agency reevaluations prepared in response to protests because they have been “prepared in the heat of an adversarial process” and “may not represent the fair and considered judgment of the agency, which is a prerequisite of a rational evaluation and source selection process”).

104. *Chicataw Constr.*, 2002 CPD ¶ 62, at 7.

105. *Id.* at 8; cf. *Postscript V: Past Performance Evaluations*, 16 NASH & CIBINIC REP. 7, ¶ 34 (2002) (concluding that the GAO endorsed a technique that represented “abysmally bad mathematics,” and arguing that FAR section 15.305(a)(2)(iv) applies to offers as a whole rather than single contracts).

106. *Chicataw Constr.*, 2002 CPD ¶ 62, at 8.

107. Comp. Gen. B-290427, Aug. 9, 2002, 2002 CPD ¶ 146.

108. *Id.* at 5-6.

109. *Id.* at 1.

110. *Id.* at 3 (citing the Agency Report, Tab 9, Final SSB Report, at 14-16).

111. *Id.* (citing the Agency Report, Tab 9, Final SSB Report, at 16-18).

112. *Id.*

113. *Id.* at 4.

114. *Id.* (citing Perini/Jones, Joint Venture, Comp. Gen., B-285906, Nov. 1, 2000, 2002 CPD ¶ 68, at 4-5; ST Aerospace Engines Pte. Ltd., B-275725, Mar. 19, 1997, 97-1 CPD ¶ 161, at 3).

115. *Id.*

trol representatives under Penaullie's proposal to be "defective."¹¹⁷ Because Penaullie did not propose to provide quality control at no cost, there was no basis to deduct such costs to determine that the protestor's price was "only marginally" lower than Penaullie's.¹¹⁸

Generalized Conclusions Are Not Enough; Give Some Analysis

In *Johnson Controls World Services, Inc.*,¹¹⁹ the protestor successfully challenged a "best value" award decision where the agency failed to provide adequate information and analysis in its contemporaneous source selection decision and in a post-protest amendment to the decision. In *Johnson Controls*, the National Aeronautics and Space Administration (NASA) issued an RFP for a variety of support services at the Johnson Space Center. The RFP provided two non-cost factors—mission suitability and past performance—which, when combined, were about equal to cost.¹²⁰

Following discussions and the receipt of final proposals, the source evaluation board's (SEB) final evaluation scored the protestor's proposal "significantly higher" than the eventual awardee, DynCorp Technical Services, Ltd. (DynCorp), but at a "somewhat higher probable cost/price."¹²¹ Focusing primarily on cost, the SEB's final report contained "no comparative analysis of offerors' relative strengths" under the non-cost factors.¹²² Similarly, when briefing the source selection authority (SSA), the SEB's charts contained no comparative analysis, nor was there any additional evidence of the contents or discussions

of the meeting. The SSA's source selection document merely concluded "without elaboration" that DynCorp's proposal represented the "best value" to the government, as there were no "discernable benefits" in the other proposals that outweighed DynCorp's "significant advantage" in lower cost.¹²³ The agency awarded the contract to DynCorp; Johnson Controls Worldwide Services (JCWS) protested. In response to this initial protest, NASA recognized that it had not recorded the "contemporaneous inquiries, judgments, tradeoffs and reasons" for the SSA's decision and filed an "addendum" to correct the omissions.¹²⁴

The GAO, in reviewing whether the SSA's decision was reasonable, consistent with the RFP's evaluation criteria, and adequately documented,¹²⁵ stated that the SSA's contemporaneous documentation was "devoid of any substantive consideration as to whether JCWS's proposal was a better value to the government than DynCorp's lower-rated, lower-priced proposal."¹²⁶ The SSA's "generalized statements" that there were "no discernable benefits" in other proposals that outweighed the "significant advantage" of DynCorp's lower-rated and lower-priced proposal "fall far short of the requirement to justify cost/technical tradeoff decisions."¹²⁷

Even after "giving full consideration" to NASA's post-protest "addendum" to the SSA's decision,¹²⁸ the GAO still concluded that there was "insufficient information and analysis in the record for [the GAO] to determine that the award selection was reasonable."¹²⁹ Citing the SSA's "reliance on an overly mechanistic methodology" when comparing past performance,

116. *Id.* at 5-6.

117. *Id.* at 6.

118. *Id.* Finding "a substantial chance for [the protestor] to receive the award under a reasonable evaluation," the GAO concluded that the Navy's errors prejudiced the protestor and recommended that the "Navy reopen discussions if necessary, request and evaluate revised proposals, and make a new source selection decision." *Id.*

119. Comp. Gen. B-289942, B-289942.2, May 24, 2002, 2002 CPD ¶ 88.

120. *Id.* at 1-2.

121. *Id.* at 3.

122. *Id.*

123. *Id.* at 4.

124. *Id.* (citing a NASA legal memorandum).

125. *Id.* at 6 (citing *AIU North America, Inc.*, Comp. Gen. B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39, at 7-8).

126. *Id.* at 6-7.

127. *Id.* at 7 (citing *TRW, Inc.*, Comp. Gen. B-234558, June 21, 1989, 89-1 CPD ¶ 584, at 5).

128. *Id.* The GAO noted the general rule that, although it considers the entire record when reviewing the reasonableness of an agency's award decision, it gives "greater weight to contemporaneous materials rather than judgments made in response to protest contentions." *Id.* (citing *Beacon Auto Parts*, Comp. Gen. B-287483, June 13, 2001, 2001 CPD ¶ 116, at 6).

129. *Id.* (citing *Beacon Auto Parts*, 2001 CPD ¶ 116, at 7-8; *Satellite Servs., Inc.*, Comp. Gen. B-286508, B-286508.2, Jan. 18, 2001, 2001 CPD ¶ 30, at 9-11; *AIU North America*, 2000 CPD ¶ 39, at 7-11).

the GAO stated that “his failure to consider the qualitative differences” between the proposals and “his failure to explain why he found no risk in awarding to DynCorp” despite the SEB’s risk assessment concerning a DynCorp subcontractor, was an unreasonable “conclusion of equivalence.”¹³⁰

Don’t Be “Mechanical” with Trade-Off Decisions, Either

In *Shumaker Trucking & Excavating Contractors, Inc.*, the GAO sustained another protest, finding that the agency’s award decision was unreasonable where the “agency mechanically applied the solicitation’s evaluation methodology.”¹³¹ The U.S. Department of Agriculture’s (USDA) solicitation for the consolidation and capping of mine waste on a Montana reclamation project established four technical factors of varying importance, which, when combined, were equal to price in importance. The RFP further provided that the award would be made to the offeror “(1) whose proposal is technically acceptable; and (2) whose technical/cost relationship is the most advantageous to the Government.”¹³²

Although URS Group’s (URS) proposal was for \$400,000 more than the protestor’s offer, the technical evaluation panel (TEP) and the contracting officer recommended award to URS, “concluding the difference in technical scores between URS and Shumaker justified the higher price.”¹³³ The SSA adopted the contracting officer’s recommendation without additional

comment.¹³⁴ Shumaker protested the award, challenging the adequacy of the agency’s explanation of its cost-technical trade-off decision.¹³⁵

While the RFP correctly stated the standard for the cost-technical trade off decision,¹³⁶ the GAO found that the agency’s “focal point” in its cost-technical trade-off analysis¹³⁷ was “URS’s higher technical point score, without discussing what, if anything, the spread between the technical scores . . . actually signified.”¹³⁸ Moreover, there was no analysis comparing the advantages in URS’s proposal to those of Shumaker’s proposal, or consideration of “why any advantages of URS’s proposal were worth the approximately \$400,000 higher price.”¹³⁹ Stating again that “point scores are but guides to intelligent decision making,”¹⁴⁰ the GAO found the agency’s cost-technical trade off decision “inadequate . . . because its mechanical comparison of the offerors’ point scores was not a valid substitute for a qualitative assessment of the technical differences . . . so as to determine whether URS’s technical superiority justified the price premium involved.”¹⁴¹

SSAs May Disagree with Evaluator Conclusions . . . Just Be Reasonable About It

While SSAs may disagree with evaluators’ conclusions,¹⁴² they must still be reasonable when doing so, and ensure that they adequately support their source selection decisions. In

130. *Id.* at 12. The GAO sustained the protest and recommended that NASA “make a new source selection decision containing a sufficient and documented comparative analysis of the proposals and the rationale for any cost/technical tradeoffs.” *Id.*

131. Comp. Gen. B-290732, Sept. 25, 2002, 2002 CPD ¶ 169.

132. *Id.* at 2 (quoting RFP, section M-1).

133. *Id.*

134. *Id.* at 2 n.4.

135. *Id.* at 3. Shumaker also argued that the agency improperly evaluated its technical proposal. *Id.* The GAO disagreed, finding that the record supported the agency’s technical evaluation. *Id.* at 6.

136. *Id.* at 6. Describing the “best value” award decision-making process, the RFP stated that “[t]he critical factor in making any cost/technical trade-offs is not the spread between the technical ratings, but rather the significance of that difference.” *Id.* (quoting RFP, section M-1).

137. *Id.* at 7. The contracting officer and the TEP concluded that the difference of about \$400,000 was “justified;” they highlighted URS’s 44% advantage in overall technical rating when compared to Shumaker, including a 100% difference in the “important aspect” of “technical approach,” and found that URS’s proposed cost was below the government estimate. *Id.* (citing the Agency Report, Tab D, Memorandum of Negotiation, at 2).

138. *Id.* at 7-8.

139. *Id.* at 8.

140. *Id.* (citing Ready Transp., Inc., Comp. Gen. B-285283.3, B-285283.4, May 8, 2001 CPD ¶ 90, at 12).

141. *Id.* (citing Opti-Lite Optical, Comp. Gen. B-281693, Mar. 22, 1999, 99-1 CPD ¶ 61, at 5).

142. While the provisions at FAR section 15.303 suggest that the source selection decision is made by a single person, some noted government contract experts “believe the source selection decision is a *team decision*, and . . . that is as it should be.” Ralph C. Nash & John Cibinic, *The Source Selection Decision: Who Makes It?*, 16 NASH & CIBINIC REP. 5 (2002). Compare this to the approach in the Army Federal Acquisition Regulations Supplement (AFARS): “The SSA shall not receive a recommendation from any individual or body as to whom shall receive the award and additionally shall not receive a rank order or order of merit list pertaining to the offers being evaluated.” U.S. DEP’T OF ARMY, ARMY FEDERAL ACQUISITION REG. SUPP. 5115.101 (Jan. 2002).

DynCorp International LLC,¹⁴³ the U.S. Army Corps of Engineers issued an RFP for base operation support services at Camp As Sayliyah, Qatar. The solicitation informed potential offerors that the agency would award based on the “best value” to the government, considering price and non-price related factors.¹⁴⁴ The technical evaluation team (TET) and the cost evaluation team (CET) reviewed the proposals. Both identified concerns about the proposal of the eventual awardee, ITT Federal Services International Corporation (ITT). The TET was primarily concerned with ITT’s proposed staffing levels and identified a performance risk based on ITT’s plan to expand its workforce only after contract award.¹⁴⁵ The CET also had concerns about ITT’s proposed staffing levels, and found ITT’s cost proposal information incomplete.¹⁴⁶ After receiving the TET and CET reports, the SSA disagreed with certain conclusions of the evaluators and determined that ITT’s proposal represented the best overall value to the government.¹⁴⁷

The protestor challenged the SSA’s decision as unreasonable; the GAO agreed. Reviewing the SSA’s decision for reasonableness, consistency with the evaluation factors, and adequacy of documentation,¹⁴⁸ the GAO found that the record provided no support for “questioning the weaknesses identified by the TET (and CET) relating to the adequacy of ITT’s proposed staffing.”¹⁴⁹ The GAO also failed to see any reasonable basis for “discounting” the performance risks the TET identified, or the CET’s determination that ITT’s cost proposal information was incomplete.¹⁵⁰ The GAO also found that the SSA engaged in “disparate treatment” by assigning a “high-perfor-

mance risk” rating to the protestor’s cost proposal based on low proposed hourly labor rates, but did not do the same for ITT, which proposed similarly low labor rates.¹⁵¹

Don’t Forget About Cost/Price

In *A&D Fire Protection Inc. (A&D Fire Protection I)*,¹⁵² the GAO reminded all agencies to consider cost or price to the government when they evaluate competitive proposals. In *A&D Fire Protection I*, the Department of Veterans Affairs (VA) issued an RFP for design and construction services at the National Cemetery in San Diego, California. The RFP listed four evaluation factors in descending order of importance: price, construction management experience, past performance, and schedule. Of the six offers the VA received, A&D Fire Protection Inc. (A&D) offered the lowest overall price.¹⁵³ The VA, however, eliminated A&D’s proposal from the competition without further consideration because the agency determined that it was not “sufficiently technically capable to perform the project.”¹⁵⁴ The GAO opinion stated that every RFP must include cost or price to the government, and that agencies must always consider cost or price when evaluating proposals. The GAO added that “the elimination of technically acceptable proposals without meaningful consideration of price is inconsistent with the agency’s obligation to evaluate proposals under all of the solicitation’s criteria, including price.”¹⁵⁵

143. Comp. Gen. B-289863, B-289863.2, May 13, 2002, 2002 CPD ¶ 83.

144. *Id.* at 2. The non-cost factors included management capability, technical capability, experience, and past performance. Because the agency also contemplated a cost reimbursement contract, it notified the offerors that proposals “would be evaluated to determine cost reasonableness, cost realism, and completeness of the costs.” *Id.* The agency would then assign a risk rating based on the cost and technical evaluations. *Id.*

145. *Id.* at 2-3.

146. *Id.* at 3.

147. *Id.* at 4. The SSA concluded that the protestor’s proposal “should have been assigned weaknesses in the area of subcontracting” and a performance risk “based on her conclusion that [the protestor’s] low labor rates could result in cost growth over the course of the contract.” *Id.* The SSA also discounted several of the weaknesses identified by the TET and CET in ITT’s proposal. *Id.* (referencing the agency’s source selection documents).

148. *Id.* (citing *AIU North America, Inc.*, Comp. Gen. B-283743.2, Feb. 16, 2000, 2000 CPD ¶ 39, at 7-8).

149. *Id.* at 5.

150. *Id.* at 6.

151. *Id.* at 10. The GAO sustained DynCorp’s protest and recommended that the agency amend the RFP to clarify its data requirements, obtain revised proposals, and evaluate the proposals consistent with its opinion before making a new source selection decision. *Id.* at 11.

152. Comp. Gen. B-288852, Dec. 12, 2001, 2001 CPD ¶ 201.

153. *Id.* at 1-2.

154. *Id.* at 3 (quoting the Agency Report). Noting that the VA appeared to suggest that A&D’s proposal was not “technically acceptable,” the GAO stated that the contemporaneous evaluation documentation contradicted any such suggestion, and that its own review of the record indicated otherwise. *Id.* at 3 n.2.

155. *Id.* (referencing *Kathpal Tech., Computer & Hi-Tech Mgmt., Inc.*, Comp. Gen. B-283137.3, Dec. 30, 1999, 2000 CPD ¶ 6, at 9, 12).

The VA followed the GAO's recommendation in *A&D Fire Protection I*, and conducted a new cost-technical tradeoff analysis in accordance with the terms of the RFP. The VA's results, however, were much the same. In *A&D Fire Protection Inc. (A&D Fire Protection II)*,¹⁵⁶ the VA determined that the proposal of the original awardee, Stronghold Engineering, Inc. (Stronghold), represented the "best value" to the government because cost savings associated with Stronghold's technical advantages offset A&D's price advantage.¹⁵⁷ More specifically, the VA concluded that Stronghold's proposal intended to shorten the completion schedule for the project by up to sixty-five days, which the VA determined would result in significant

cost savings to the agency. A&D once again challenged the VA's decision, asserting that Stronghold offered "no commitment," but only an "attempt" to complete the project in less time than the solicitation required.¹⁵⁸ The GAO again agreed with A&D, finding that the VA erroneously concluded that Stronghold offered a shorter performance schedule. Reviewing the language of Stronghold's proposal, the GAO sustained the protest, determining that "Stronghold's 'intention' and 'belief' that it could complete the contract work sooner than the minimum 420-day completion schedule required by the RFP is not the contractual commitment that the solicitation required to receive additional evaluation credit for an accelerated schedule."¹⁵⁹ Major Huyser.

156. Comp. Gen. B-288852.2, May 2, 2002, 2002 CPD ¶ 74.

157. *Id.* at 4.

158. *Id.* The cemetery's lack of spaces was costing the VA \$2500 per day to store remains until it could bury them. Using this figure, the VA calculated that Stronghold's shorter completion time represented savings of \$162,500 to the agency. *Id.* The agency also determined that Stronghold's record of "efficiently performing the project to avoid the least amount of disruption in the project's surrounding environment" represented additional cost savings. *Id.* (quoting the Agency Report, Tab W, Cost/Technical Tradeoff Reevaluation of Offers (Jan. 7, 2002)).

159. *Id.* at 5. A&D also challenged the propriety of the VA's decision to allow Stronghold to continue contract performance after the initial protest filing. *Id.* at 6. While the VA project manager drafted a justification memorandum for continued performance based on urgent and compelling circumstances, higher headquarters lost the memorandum. Thus, no appropriate authority had signed the memorandum, and no one provided it to the GAO, as required under the Competition in Contracting Act of 1984. *Id.* at 6-7 (citing 31 U.S.C. § 3553(d)(3)(C) (2000)). Accordingly, the GAO recommended that the VA direct Stronghold to discontinue performance until the VA reevaluated the proposals and performed a new cost-technical tradeoff, consistent with the RFP's terms. *Id.* at 7.

Threshold Raised in Defense Against Terrorism

On 30 August 2002, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council (DARC) issued an interim rule increasing the micro-purchase threshold and the simplified acquisition thresholds for anti-terrorist defense procurements.¹ The rule applies to acquisitions for fiscal years 2002 and 2003. The micro-purchase threshold for Department of Defense (DOD) acquisitions of supplies or services to facilitate the defense against terrorism or biological or chemical attack against the United States increased to \$15,000.² The threshold for simplified acquisitions in support of contingency operations in the United States has increased to \$250,000, and the threshold for acquisitions in support of contingency operations outside the United States has increased to \$500,000.³ The new regulations treat DOD-related acquisitions for biotechnology supplies or services for anti-terrorism defense as commercial item procurements.⁴ Agencies purchasing supplies or services using this authority must establish a clear and direct relationship between the purchase and the defense against terrorism or biological or chemical attack.⁵

Last year's *Year in Review* discussed the requirement to "play fair when conducting a simplified acquisition that looks like a negotiated procurement."⁶ The Comptroller General has since sustained three simplified acquisition procurement protests because agencies failed to evaluate the requests for quotations (RFQ) fairly. In *Kathryn Huddleston and Associates (KHA)*,⁷ the Army Corps of Engineers (the Corps) issued an RFQ for an instruction course for teachers. The RFQ indicated that the commercial item procurement would use simplified acquisition procedures under Federal Acquisition Regulation (FAR) part 13.⁸ The solicitation required two instructors for each session. The RFQ required two hundred hours of teaching experience during the previous five years for the lead instructor and one hundred hours of teaching experience during the previous three years for the assistant instructor. An amendment listed three evaluation criteria: teaching experience, educational qualifications, and price.⁹ The RFQ indicated that teaching experience and educational qualifications were of equal importance and that price was significantly less important than the other two factors.¹⁰ The Corps included only ACT II's quote in the competitive range.¹¹ Although ACT II's quote failed to meet the minimum solicitation requirements, the Corps allowed ACT II to correct this deficiency during discussions.¹² KHA challenged the evaluation of its quote, and the General Accounting Office (GAO) sustained the protest.

1. Temporary Emergency Procurement Authority, 67 Fed. Reg. 56,120 (Aug. 30, 2002) (to be codified at 48 C.F.R. pts. 2, 12, 13, 19, 25, and 48).

2. 67 Fed. Reg. at 56,121 (amending 48 C.F.R. pt. 2). This change does not apply to construction subject to the Davis-Bacon Act. The previous micro-purchase threshold was \$2500. 48 C.F.R. pt. 2 (2002).

3. *Id.* The simplified acquisition threshold was \$100,000. For purchases in support of a contingency operation outside the United States, however, the simplified acquisition threshold was \$200,000. 48 C.F.R. pt. 2.

4. *Id.* (amending 48 C.F.R. pt. 12).

5. *Id.* (amending 48 C.F.R. pt. 48).

6. Major John Siemietkowski, et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 29-30.

7. Comp. Gen. B-289453, Mar. 11, 2002, 2002 CPD ¶ 57.

8. *Id.* at 2. GENERAL SERVS. ADMIN. ET AL., FED. ACQUISITION REG. pt. 13 (July 2002) [hereinafter FAR].

9. *Kathryn Huddleston*, 2002 CPD ¶ 57, at 3. KHA alleged that it did not receive the amendment prior to submitting its quote. A Corps of Engineers contract specialist claimed that, "to the best of his recollection," the Corps informed KHA that it would post solicitation changes on the Corps electronic bulletin board. The GAO sustained the protest without reaching this issue. *Id.* at 7.

10. *Id.* An informal technical evaluation board evaluated the quotes. *Id.*

11. *Id.* at 5.

12. *Id.* at 4. "[The ACT II quote] contained inconsistencies in the amount of experience claimed, did not show the proposed instructors had the required amount of experience, and did not identify for each course section which instructors would be lead and assistant instructors." *Id.* The Corps alleged that KHA's quote could not be cured with clarifications or discussions. *Id.* at 5.

The GAO found that the Corps acted unreasonably when it excluded KHA's quote from the competitive range, and that the Corps "failed to treat the two firms fairly and equally with respect to conducting discussions."¹³ The exclusion of KHA's quote from the competitive range was also unreasonable because KHA's quote and ACT II's quote contained similar deficiencies.¹⁴ The Corps was unable to convince the GAO that KHA's quote could not be cured with discussions.¹⁵ In addition, because KHA's quote was lower than ACT II's quote and received a higher adjectival rating on an equally important evaluation criterion—educational qualifications—the GAO found no basis for the government's argument that "KHA's quote had no realistic prospect of receiving the award."¹⁶ The GAO, therefore, "recommended the Corps conduct a new source selection decision."¹⁷

In *Elementar Americas, Inc.* (Elementar),¹⁸ the U.S. Forest Service, using simplified procedures, issued an RFQ for a combustion nitrogen-carbon analyzer. The RFQ requested a brand-name or equal product.¹⁹ The solicitation failed to list any salient characteristics or minimum requirements, but indicated that quotes should contain technical descriptions sufficiently detailed to evaluate compliance.²⁰ The RFQ allowed bidders to provide this information through a variety of sources, including product literature. The Forest Service received a quote

from Elantech for a brand-name product and a quote from Elementar for a lower-priced "equal" product.²¹ The Forest Service determined that Elementar's product failed to analyze samples in sufficient time to meet the Forest Service's requirement.²² The Forest Service decided that Elementar's product was not equal and awarded the contract to Elantech.²³ Elementar protested the Forest Service's evaluation.²⁴

The GAO held that "the Forest Service is precluded from rejecting a quote offering an equal product for noncompliance with some performance or design feature, unless the offered item is significantly different from the brand-name product."²⁵ While the Forest Service argued that Elementar's product failed to analyze samples in the required two and a half minutes, it could not establish that Elantech's product could meet this requirement, either.²⁶ The descriptive literature for both products suggested that their analysis times were comparable.²⁷ Elementar's descriptive literature addressed the deficiencies alleged by the Forest Service; the record did not establish that Elementar's product deviated significantly from the brand-name product. Therefore, even though this was a simplified acquisition, GAO held that the Forest Service "did not reasonably consider the descriptive literature or reasonably evaluate Elementar's quote."²⁸

13. *Id.* at 7. The GAO acknowledged that "although an agency is not required to establish a competitive range or conduct discussions under simplified acquisition procedures, . . . where an agency avails itself of these negotiated procurement procedures, the agency should fairly and reasonably treat quoters in establishing the competitive range and conducting discussions." *Id.* at 6.

14. *Id.* at 6. KHA's quote failed to demonstrate the relevant required experience; the assistant instructor did not meet the three-year experience requirement. *Id.* at 4.

15. *Id.* at 7. The Corps was also unable to rebut "KHA's statements that it could provide further information or revise its quote such that it would become acceptable." *Id.*

16. *Id.* ACT II received a higher adjectival rating than KHA under teaching experience; however, "KHA received a higher adjectival rating under the equally important educational qualifications factor and quoted a lower price than ACT II." *Id.*

17. The GAO recommended that the Corps "include KHA in the competitive range, conduct discussions with KHA and ACT II, and request revised quotes." *Id.* at 7.

18. Comp. Gen. B-289115, Jan. 11, 2002, 2002 CPD ¶ 20.

19. *Id.* at 1. The RFQ stated that the product was a commercial item. *Id.*

20. *Id.* at 2.

21. *Id.* Elantech's quoted price was \$32,675; Elementar's quoted price was \$28,200. *Id.*

22. *Id.* at 3. The Forest Service claimed that Elementar's product failed to analyze samples in sufficient time to meet the agency's yearly analysis requirements. The Forest Service argued that Elantech's product could analyze samples in two and a half minutes, but the literature indicated that the analysis time was less than five minutes. The Forest Service claimed that a discussion with an Elementar representative seven months before the solicitation notice revealed that the Elementar product analyzed samples in ten minutes. Elementar alleged that its product could analyze samples in four to six minutes. *Id.*

23. *Id.* at 2.

24. *Id.*

25. *Id.* (citing Access Logic, Inc., Comp. Gen. B-274748, B-274748.2, Jan. 3, 1997, 97-1 CPD ¶ 36, at 3-6). *Id.*

26. *Elementar Americas*, 2002 CPD ¶ 20, at 3. The Forest Service argued that the analysis time associated with processing samples was the primary reason Elementar's product was not equal. *Id.*

27. *Id.* The GAO determined that Elantech's "less than five minutes" was comparable to Elementar's "four to six minutes." *Id.*

In *Sonetronics, Inc.*,²⁹ UNICOR,³⁰ issued an RFQ for 30,000 military radio handsets. The RFQ indicated that the award would be based on “best value,” considering past performance, technical factors, and price.³¹ Price and technical factors were worth a combined fifty points, and past performance was worth fifty points. Offerors were required to identify at least three previous completed contracts.³² Maranatha and Sonetronics each earned fifty points for past performance, but the agency used two uncompleted contracts to evaluate Maranatha’s past performance.³³ Sonetronics alleged that the agency unreasonably evaluated Maranatha’s past experience. The GAO sustained the protest because the RFQ stated that the evaluation of past performance would be based on “completed” contracts.³⁴ The Sonetronics quote only included one completed contract; therefore, Sonetronics’s perfect score for past performance was

unreasonable and failed to comply with the stated evaluation scheme.³⁵ Major Davis.

Government Purchase Card and Travel Card

During the past year, the General Accounting Office (GAO) issued a series of stinging audit reports concerning the Government Purchase Card and Travel Card Programs.³⁶ Daily newspapers picked up on the most lurid details of these reports.³⁷ Rather than dwell on individual abuses, however, the GAO audits focus on “control weaknesses” that leave government agencies “vulnerable to fraud, waste and abuse.”³⁸

28. *Id.* at 5.

29. Comp. Gen. B-289459.2, Mar. 18, 2002, 2002 CPD ¶ 48.

30. See generally UNICOR Web Site, at www.unicor.gov (last visited Jan. 6, 2003).

31. *Id.* at 1.

32. *Id.* Offers could identify similar federal, state, local, or private contracts. *Id.*

33. *Id.* at 3. The Maranatha and Sonetronics bids each received twenty-five technical points. Maranatha’s quote of \$925,000 received 25 points for price and Sonetronics’s quote of \$1,102,500 received 20.96 points for price. *Id.*

34. *Id.*

35. *Id.* Under Sonetronics’s two uncompleted contracts, it had made no deliveries and had not passed first-article testing. *Id.*

36. See GEN. ACCT. OFF., REP. NO. GAO-03-169, *Travel Cards: Control Weaknesses Leave Army Vulnerable to Potential Fraud and Abuse* (Oct. 11, 2002); GEN. ACCT. OFF., REP. NO. GAO-03-148T, *Travel Cards: Control Weaknesses Leave Navy Vulnerable to Fraud and Abuse* (Oct. 8, 2002); GEN. ACCT. OFF., REP. NO. GAO-03-154T, *Purchase Cards: Navy Vulnerable to Fraud and Abuse but Is Taking Action to Resolve Control Weaknesses* (Oct. 8, 2002) [hereinafter GAO-03-154T]; GEN. ACCT. OFF., REP. NO. GAO-02-1041, *Purchase Cards: Navy Is Vulnerable to Fraud and Abuse but Is Taking Action to Resolve Control Weaknesses* (Sept. 27, 2002) [hereinafter GAO-02-1041]; GEN. ACCT. OFF., REP. NO. GAO-02-844T, *Purchase Cards: Control Weaknesses Leave Army Vulnerable to Fraud, Waste, and Abuse* (July 17, 2002) [hereinafter GAO-02-844T]; GEN. ACCT. OFF., REP. NO. GAO-02-863T, *Travel Cards: Control Weaknesses Leave Army Vulnerable to Potential Fraud and Abuse* (July 17, 2002) [hereinafter GAO-02-863T]; GEN. ACCT. OFF., REP. NO. GAO-02-732, *Purchase Cards: Control Weaknesses Leave Army Vulnerable to Fraud, Waste, and Abuse* (June 27, 2002) [hereinafter GAO-02-732]; GEN. ACCT. OFF., REP. NO. GAO-02-676T, *Government Purchase Cards: Control Weaknesses Expose Agencies to Fraud and Abuse* (May 1, 2002) [hereinafter GAO-02-676T]; GEN. ACCT. OFF., REP. NO. GAO-02-506T, *Purchase Cards: Continued Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Mar. 13, 2002) [hereinafter GAO-02-506T]; GEN. ACCT. OFF., REP. NO. GAO-02-32, *Purchase Cards: Control Weaknesses Leave Two Navy Units Vulnerable to Fraud and Abuse* (Nov. 30, 2001). In addition to the GAO’s findings and criticisms, a Department of Defense (DOD) Inspector General’s Report indicated that between “FY 1996 and FY 2001, over 300 audit reports identified a wide range of implementation problems in the DOD Purchase Card Program.” U.S. DEP’T OF DEFENSE INSPECTOR GENERAL, CONTROLS OVER THE DOD PURCHASE CARD PROGRAM, AUDIT REP. NO. D-2002-075 (Mar. 29, 2002).

37. See, e.g., David Pace, *GAO: Army Credit Cards Go Beyond Call of Duty; Report Claims Rampant Abuses, Cites Lap Dances*, CHI. TRIB., July 18, 2002, at 11. The article reported:

Nearly 200 Army personnel used government charge cards to get \$38,000 in cash to spend on “lap dancing and other forms of entertainment” at strip clubs near military bases . . . [T]he soldiers used their military identification and government travel cards to obtain the cash from adult entertainment clubs, which added a ten percent fee. The clubs billed the travel cards for the full amount as a restaurant charge, the GAO found. An Army spokesman said he did not know what, if any, disciplinary action had been taken against the 200 individuals. But the GAO said it found “little evidence of documented disciplinary action against Army personnel who misused the card, or that Army travel program managers or supervisors were even aware that Army personnel were using their travel cards for personal use.” The GAO report found that government cards had been used for personal purchases of more than \$100,000 for computers and other electronic equipment, \$45,000 for cruises, and \$7,373 for closing costs on a home. In addition, it questioned purchases of fine china, cigars, wine, a trip to Las Vegas, Internet and casino gambling, and two pictures of Elvis Presley bought at his Graceland mansion in Memphis.

Id.

38. GAO-02-506T, *supra* note 36; GAO-02-732, *supra* note 36; GAO-02-863T, *supra* note 36.

The GAO audit of the Army's purchase card program revealed problems encountered throughout the executive agencies, including lack of formal agency-wide regulation or guidance,³⁹ ineffective oversight at various levels,⁴⁰ lack of controls over issuing and renewing cards,⁴¹ assigning too many cardholders per billing official, lack of control over cardholder spending limits,⁴² inadequate monitoring of potentially abusive and questionable transactions,⁴³ failure to cancel accounts for departed cardholders,⁴⁴ and inadequate training.⁴⁵ In addition, GAO identified four particular "internal control techniques" the Army had not effectively implemented: advance approval of purchases;⁴⁶ independent receiving and acceptance of goods and services by someone other than the cardholder;⁴⁷ independent approving official review of the cardholder's statements,⁴⁸ and obtaining and providing invoices.⁴⁹

On 31 July 2002, the Army issued its Government Purchase Card Standard Operating Procedure (Purchase Card SOP).⁵⁰ The Purchase Card SOP sets forth the organizational structure

of the purchase card program.⁵¹ It also mandates specific "span of control" guidelines limiting the number of accounts per installation program coordinator to three hundred and the number of cardholders per billing official to seven.⁵² The Purchase Card SOP requires use of the electronic "Customer Automated Reports Environment" and sets specific timelines for cardholders to review—and billing officials to certify—monthly statements.⁵³ Certifying officials, usually cardholders' first line supervisors, are also pecuniarily liable for illegal, improper, or incorrect payments due to inaccurate or misleading certifications.⁵⁴ The Purchase Card SOP also discusses training for newcardholders and billing officials, refresher training, and special training for cardholders with authority to make purchases above \$2500.⁵⁵ Other topics in the Purchase Card SOP include property accountability,⁵⁶ surveillance,⁵⁷ suspected fraud or abuse,⁵⁸ roles and responsibilities of the key players,⁵⁹ establishing accounts,⁶⁰ spending thresholds for the different types of card purchases,⁶¹ the "pay and confirm" policy,⁶² pro-

39. GAO-02-732, *supra* note 36, at 4.

40. *Id.* at 16-18.

41. *Id.* at 13.

42. *Id.* at 14, 25.

43. *Id.* at 19-20.

44. *Id.* at 20-21.

45. *Id.* at 18. The Army audit revealed adequate initial training, but inadequate refresher training. *Id.*

46. *Id.* at 29-31.

47. *Id.* at 31-32.

48. *Id.* at 33-38.

49. *Id.* at 38.

50. U.S. DEP'T OF ARMY, GOVERNMENT PURCHASE CARD STANDARD OPERATING PROCEDURE (31 July 2002).

51. *Id.* at 3-4.

52. *Id.* at 5.

53. *Id.* at 6-7.

54. *Id.* at 10.

55. *Id.* at 16-17.

56. *Id.* at 8.

57. *Id.*

58. *Id.* at 9.

59. *Id.* at 11.

60. *Id.* at 17.

61. *Id.* at 18.

hibited items,⁶³ purchase card use during contingencies,⁶⁴ and convenience checks.⁶⁵ Lieutenant Colonel Benjamin.

62. *Id.* at 19. The Army's policy is to certify an invoice even if the cardholder has not yet received all of the items on the invoice. If the cardholder has not received the item within forty-five days, the cardholder will dispute the transaction. *Id.*

63. *Id.* at 19.

64. *Id.* at 21.

65. *Id.* at 22.

Contractor Qualifications: Responsibility

A Couple of Follow-Ups

As reported in last year's *Year in Review*,¹ in *Impresa Construzioni Geom. Domenico Garufi v. United States (Impresa)*,² the United States Court of Appeals for the Federal Circuit (CAFC) applied a rational basis standard to judicial review of contracting officer responsibility determinations.³ When the CAFC applied this standard to the facts of *Impresa*, however, it could not assess the reasonableness of the contracting officer's determination "because the contracting officer's reasoning supporting that determination is not apparent from the record."⁴ The CAFC remanded the case to the Court of Federal Claims (COFC) for a deposition of the contracting officer to determine specifically "(1) whether the contracting officer, as required by 48 C.F.R. § 9.105-1(a), possessed or obtained information sufficient to decide the integrity and business ethics issue, including the issue of control, before making a determination of responsibility; and (2) on what basis he made the responsibility determination."⁵

On remand, the COFC determined that the "contracting officer, based on his deposition testimony, . . . failed to conduct an independent and informed responsibility determination."⁶ More specifically, the COFC found that the contracting officer unreasonably relied on the technical evaluation board's review, which was "limited to checking the master list of debarred firms and curiously confirming the offeror's satisfactory performance on past contracts."⁷ Additionally, the contracting officer failed to inquire independently about JVC's responsibility or investigate the terms of the receivership agreement, despite knowing

of an ongoing investigation of bid-rigging at Sigonella and the Italian court actions against JVC, the apparent awardee.⁸ The court found that the contracting officer instead "made assumptions about the terms of the receivership agreement, but he did not himself read it nor did he obtain assistance in reading it."⁹ Because the contracting officer "lacked sufficient information to be in a position to make the assumptions he did and because he failed to make an affirmative assessment of JVC's responsibility," the COFC held that the contracting officer failed to conduct a reasonable responsibility determination and sustained the protest.¹⁰

The Times, They Are A-Changing

Last year's *Year in Review* reported that the standard set forth by the CAFC in *Impresa* conflicted with the General Accounting Office (GAO) bid protest rule addressing affirmative responsibility determinations.¹¹ In light of the CAFC's decision, the GAO announced in February 2002 that it was considering a revision of its bid protest rules and welcomed comments.¹² After considering the comments, the GAO proposed revising its affirmative responsibility rule at section 21.5(c) to expand its consideration of such determinations "where there is evidence raising serious concerns as to whether the contracting officer unreasonably failed to consider available relevant information, or otherwise violated a statute or regulation."¹³ Such protests must be based on more than "mere information and belief or speculation" and must be "substantial enough to bring into question whether the affirmative determination could have a rational underpinning."¹⁴ Under the proposed language, the "GAO anticipates that allegations most commonly will be

1. See Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 55-56 [hereinafter *2001 Year in Review*].

2. 238 F.3d 1324, 1327-28 (Fed. Cir. 2001).

3. *Id.* at 1327-28.

4. *Id.* at 1337. In *Impresa*, the appellant, Impresa Construzioni Geom. Domenico Garufi (Garufi), protested the Navy's decision to award a consolidated services contract at the naval air station in Sigonella, Italy, to Joint Venture Conserv (JVC). Garufi alleged that JVC was not responsible under Federal Acquisition Regulation (FAR) 9.104-1 because an Italian court, prior to the contracting officer's responsibility determination and award decision, found that an owner of the joint venture partners was involved in a Mafia organization and had engaged in a bid-rigging scheme at the station. This finding resulted in the Italian court placing the three companies under a receivership administered by the court. *Id.*

5. *Id.* at 1339.

6. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 52 Fed. Cl. 421, 427 (2002).

7. *Id.*

8. *Id.*

9. *Id.* at 428.

10. *Id.* In sustaining the protest, the COFC awarded bid preparation and proposal costs to Garufi. It also ordered the parties to confer about non-monetary relief and address the propriety of non-monetary relief in subsequent filings to the court. *Id.* After consideration of the parties' separate filings on the matter, the COFC ordered injunctive relief. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 52 Fed. Cl. 826 (2002). Concluding that Garufi had been prejudiced by the contracting officer's unreasonable responsibility determination, the COFC further found that Garufi satisfied the additional requirements for obtaining injunctive relief and enjoined the Navy from exercising the option on the contract. The court ordered the Navy to re-solicit and award the contract as soon as practicable to ensure continued performance. *Id.* at 829.

based on the alleged failure of the contracting officer to consider publicly-available relevant information,” as occurred in the CAFC’s *Impresa* decision.¹⁵ To date, however, the GAO has not changed its bid protest regulations, meaning that the “GAO’s long held view that such determinations are so subjective that they do not lend themselves to reasoned review” remains.¹⁶

Bankruptcy and Responsibility

Both the CAFC and the GAO had the opportunity to address the impact of a prospective contractor’s bankruptcy filing upon the contracting officer’s responsibility determination. While bankruptcy is obviously a factor that the contracting officer must consider, both the CAFC and the GAO have recently held that a prospective contractor is not necessarily nonresponsible just because it has filed for bankruptcy. These decisions further illustrate the discretion that contracting officers exercise in making their responsibility determinations, and the emerging importance of documenting the determination process.

In *Bender Shipbuilding & Repair Co. v. United States*,¹⁷ the CAFC affirmed a COFC decision upholding the contracting officer’s affirmative determination that Halter Marine, Inc.

(Halter Marine), the awardee of an Army contract for the construction of specialized ships, was a responsible prospective contractor, even though Halter Marine and its parent company had filed for Chapter 11 Bankruptcy reorganization shortly before the award. In light of this bankruptcy filing and given that a “responsible” contractor under FAR 9.104-1(a) must “have adequate financial resources to perform the contract, or the ability to obtain them,”¹⁸ Bender Shipbuilding and Repair Company alleged that the contracting officer’s responsibility determination was “arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁹ The CAFC disagreed and denied the appeal, concurring instead with the COFC’s finding that “the contracting officer made an informed, complicated business judgment based on ample factual support in the record, and the agency provided a coherent, reasonable explanation for the exercise of the contracting officer’s decision.”²⁰ The CAFC considered information from two pre-award surveys by the Defense Contract Management Agency (DCMA), as well as other financial reports and expert advice the contracting officer relied on to make his responsibility determination.²¹ The CAFC agreed that “[a]lthough Halter Marine and its parent had financial problems, we cannot say the contracting officer’s determination that Halter Marine was financially responsible was arbitrary and capricious or without adequate factual basis.”²²

11. 2001 Year in Review, *supra* note 1, at 55. The relevant provision in the GAO’s bid protest regulations states:

Because the determination that a bidder or offeror is capable of performing a contract is based in large measure on subjective judgments which generally are not readily susceptible of reasoned review, an affirmative determination of responsibility will not be reviewed absent a showing of possible bad faith on the part of the government officials or that definitive responsibility criteria in the solicitation were not met.

4 C.F.R. § 21.5(c) (2002).

12. General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contracts, 67 Fed. Reg. 8485 (draft published Feb. 25, 2002).

13. Proposed Rules; General Accounting Office, Administrative Practice and Procedure, Bid Protest Regulations, Government Contract, 67 Fed. Reg. 61,542, at 61,543 (proposed Oct. 1, 2002) (to be codified at 4 C.F.R. pt. 21).

14. *Id.*

15. *Id.*

16. 67 Fed. Reg. at 8485. See, e.g., Hot Shot Express, Inc., Comp. Gen. B-290482, Aug. 2, 2002, 2002 CPD ¶ 139, at 2 (citing and applying 4 C.F.R. § 21.5(c) in denying review of an affirmative responsibility determination).

17. 297 F.3d 1358 (Fed. Cir. 2002).

18. *Id.* at 1361.

19. *Id.*

20. *Id.* at 1362 (quoting the COFC’s opinion below).

21. The contracting officer requested a second pre-award survey in response to Halter Marine and its parent company filing for Chapter 11 Bankruptcy reorganization. *Id.* at 1360. Additionally, the contracting officer sent a number of financial experts to the parent company’s headquarters “to assess [the company’s] ‘long-term survival prospects . . . and its capability to assure the availability of working capital to perform [the] prospective contract.’” *Id.* Thus, at the time of his responsibility determination, the contracting officer had information: (1) that the parent company “guaranteed Halter Marine’s performance;” (2) on “details of the governments progress payments during the performance of the contract;” and (3) that “Halter Marine would have available as working capital the proceeds of its parent company’s sale of a foreign subsidiary.” *Id.* at 1362.

22. *Id.*

The GAO similarly recognized a contracting officer's discretion in making responsibility determinations when it upheld a contracting officer's determination that a prospective contractor was nonresponsible in *Global Crossing Telecommunications, Inc.*²³ The protestor, Global Crossing Telecommunications, Inc. (Global Crossing) challenged the award of a Defense Research Engineering Network contract to MCI WorldCom Communications, Inc. (WorldCom). Under the initial "best value" solicitation, issued on 5 January 2001, the agency evaluated Global Crossing's proposal as the highest-rated and lowest-priced and made an award to Global Crossing on 9 July 2001. After the non-selected bidders protested, however, the agency took corrective action that included canceling the award to Global Crossing, amending the solicitation, and recompeting the requirement.

Following the recompetition, the agency again evaluated Global Crossing's proposal as the highest-rated, lowest-priced proposal.²⁴ Before re-awarding the contract to Global Crossing, however, the contracting officer saw news reports about financial difficulties at Global Crossing. Based on this information, the contracting officer requested that the DCMA conduct a pre-award survey. While the DCMA determined that Global Crossing had financial problems, it rated Global Crossing's financial status "satisfactory" and concluded it still had "the financial resources to perform this solicitation based on having sufficient working capital on hand and the signed Corporate Guarantee from the parent company."²⁵ Relying on this pre-award survey, the contracting officer determined that Global Crossing was responsible.²⁶

Shortly before the planned award, Global Crossing announced that it was filing for reorganization under Chapter 11 of the Bankruptcy Code.²⁷ At this point, the contracting officer requested that the DCMA conduct a second pre-award survey. Based on the findings and recommendations in the

DCMA's second pre-award survey, the contracting officer determined that Global Crossing was nonresponsible.²⁸

Global Crossing protested its non-selection; while it did not challenge the factual accuracy of the second pre-award survey, Global Crossing alleged that the nonresponsibility determination was unreasonable because it was based on the same information that the DCMA uncovered during the initial pre-award survey—information which the contracting officer initially relied upon to determine that Global Crossing was responsible.

In its decision, the GAO conceded that both surveys included much of the same financial information, and that little time had passed between the two pre-award surveys, but it also noted that Global Crossing "had commenced bankruptcy proceedings" in the interim.²⁹ Although the bankruptcy filing did not necessarily render Global Crossing nonresponsible, the GAO stated that "bankruptcy may nevertheless be considered as a factor in determining that a particular bidder is nonresponsible."³⁰ The GAO further stated that "a contracting officer may reasonably view bankruptcy as something other than a favorable development."³¹ Here, the risks of non-performance that the protestor's bankruptcy filing created played a "significant part" in the contracting officer's nonresponsibility determination. Global Crossing provided no evidence "that these risks were not significant or that the agency's consideration of the risks associated with the protestor's bankruptcy proceedings was unreasonable."³²

The GAO also found that the second requested pre-award survey "was more extensive, considered additional information not previously available, and examined risks more critically."³³ In its second survey, the DCMA considered Global Crossing's estimated fourth quarter revenues and information about the bankruptcy proceedings that was previously unavailable.³⁴ The DCMA's second survey also identified increased risks to the

23. Comp. Gen. B-288413.6, B-288413.10, June 17, 2002, 2002 CPD ¶ 102.

24. *Id.*

25. *Id.* at 3 (quoting the DCMA's first survey).

26. *Id.* at 5.

27. *Id.*

28. *Id.* at 5.

29. *Id.* at 7.

30. *Id.* (citing *Wallace & Wallace, Inc., Wallace & Wallace Fuel, Inc.—Recon.*, Comp. Gen. B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142, at 5).

31. *Id.* (referencing *Wallace & Wallace, Inc., Wallace & Wallace Fuel, Inc.—Recon.*, Comp. Gen. B-209859.2, B-209860.2, July 29, 1983, 83-2 CPD ¶ 142, at 5 n.1; *Harvard Mfg. Co.*, Comp. Gen. B-247400, May 1, 1992, 92-1 CPD ¶ 413, at 6).

32. *Id.* at 7-8.

33. *Id.* at 8.

34. *Id.*

agency associated with the bankruptcy filing, such as limitations on the agency's ability to terminate the contract in the future, and other adverse considerations, such as an ongoing investigation by the SEC and reports of a potential investigation by the FBI.³⁵ The GAO noted that the second pre-award survey

provided a rational basis for the contracting officer to change her initial responsibility determination, and found that "her prior determinations that Global Crossing was responsible cannot be viewed as precluding the subsequent nonresponsibility determination."³⁶ Major Huyser.

35. *Id.* at 4-5. Global Crossing also alleged that the agency had treated it and WorldCom unequally by considering the SEC and FBI investigations into Global Crossing's business practices without considering similar reports about WorldCom. The GAO dismissed this complaint, noting that there was no evidence of similar adverse information against WorldCom or that the agency "knew or should have known of such information." *Id.* at 9. Moreover, the record demonstrated that the pre-award surveys for both businesses analyzed similar types of information and showed that "[WorldCom] maintains a significantly stronger financial position without the same risks arising from bankruptcy that exist for Global Crossing." *Id.* Interestingly, shortly after the issuance of the *Global Crossing* opinion, WorldCom publicly announced that it had committed significant accounting improprieties and later filed for Chapter 11 reorganization protection. See Simon Romero & Riva D. Atlas, *WorldCom's Collapse: The Overview*, N.Y. TIMES, July 22, 2002, at A1. In light of WorldCom's public announcements, Sprint Communications and Global Crossing contended in subsequent bid protests that the agency had relied upon a "material representation" by WorldCom in making its award. Sprint Communications Co. LP, Global Crossing, B-288413.11, B-288413.12, 2002 U.S. Comp. Gen. LEXIS 154, at *2 (Oct. 8, 2002). While the GAO recognized that WorldCom's announcements demonstrated that the "agency relied on grossly inaccurate financial information in making a determination that WorldCom was a responsible contractor," the GAO dismissed the protests. *Id.* at *8. The GAO determined that the misrepresentation related to information submitted during the pre-award survey, not representations in WorldCom's proposal; therefore, the protest amounted to a challenge of the agency's affirmative determination, which the GAO will not consider under its current bid protest regulations, absent bad faith. *Id.* at *9 (citing 4 C.F.R. § 21.5(c) (2002)).

36. *Global Crossing*, 2002 CPD ¶ 102, at 8 (referencing Microdyne Corp., B-171108, 1971 Comp. Gen. LEXIS 2836 (Apr. 6, 1971); Harvard Interiors Mfg. Co., Comp. Gen. B-247400, May 1, 1992, 92-1 CPD ¶ 413, at 9; Firm Enrich Bernion GmbH, Comp. Gen. B-234680, B-234681, July 3, 1989, 89-2 CPD ¶ 1, at 6)).

Commercial Items

There's Just No Comparison

In December 2001, Congress qualified the status of Federal Prison Industries, also known as UNICOR,¹ as a mandatory source by requiring the Department of Defense (DOD) to determine whether UNICOR products are comparable to products available in the commercial market.² On 26 April 2002, the DOD issued an interim rule implementing Congress's intent.³ The rule requires contracting officers to conduct market research to determine whether UNICOR products are comparable to products available on the commercial market in terms of price, quality, and time of delivery.⁴ The interim rule requires the contracting officer to purchase from UNICOR if the UNICOR product is comparable to private industry products that best meet the government's needs in terms of price, quality, and time of delivery.⁵ Otherwise, the contracting officer is required to use competitive procedures to acquire the product. UNICOR is authorized to compete, and the contracting officer must consider a timely UNICOR offer. The comparability determination is solely within the agency's discretion.⁶

The Defense Acquisition Regulations Council (DARC) received more than forty comments on the interim rule from trade associations, federal agencies, and members of Congress.⁷ "Most of the comments focused on the interpretation of [UNICOR's] waiver powers, the rule's effect on set-aside contracts, and the need for more clearly defined terms."⁸ Due to the num-

ber of comments, the council did not estimate when it expects to issue a final rule.⁹

Try Door Number Two

The General Accounting Office (GAO) reviewed a comparability issue less than three months after the DOD issued the interim rule. In *Federal Prison Industries*,¹⁰ the U.S. Marine Corps conducted market research to determine whether UNICOR furniture products were comparable in price, quality, and time of delivery.¹¹ The agency required installation of the furniture by 12 July 2002. UNICOR required ninety days lead time for delivery and three weeks for installation. The market research revealed that vendors on the General Services Administration's (GSA) Federal Supply Schedule (FSS) could meet the agency's delivery schedule at a lower price. The agency determined that UNICOR's products were not comparable, and the contracting officer conducted an FSS competition.¹²

"Competitive procedures" entailed vendors submitting e-mails verifying price and delivery time. The contracting officer did not issue a formal solicitation. UNICOR submitted a price higher than one FSS vendor and indicated that it could deliver and install the furniture by 8 July 2002 if the agency submitted a purchase order by 1 April 2002. Because funding for the project would not be obligated until late April 2002, the contracting officer determined that UNICOR's delivery terms failed to meet the agency's requirement. The contracting

1. Federal Prison Industries (FPI) or UNICOR is part of the Bureau of Prisons. The mission of the FPI is to employ and provide skills to inmates confined within the Federal Bureau of Prisons. The inmates of the self-sustaining program produce items for sale to other federal agencies. See U.S. Bureau of Prisons, *UNICOR Web Site*, at www.unicor.gov/about/inex.htm (last visited Jan. 6, 2003).

2. 10 U.S.C. § 2410n (2000). Previously, contracting officers were required to purchase from UNICOR and were not authorized to compare UNICOR products to private industry products. *Id.*

3. Competition Requirements for Purchases From a Required Source, 67 Fed. Reg. 20,687 (Apr. 26, 2002) (to be codified at C.F.R. pts. 208, 210).

4. 67 Fed. Reg. at 20,688.

5. *Id.* The requirements of Part 8 of the Federal Acquisition Regulation (FAR) must be followed if the UNICOR product is comparable. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 8 (July 2002) [hereinafter FAR].

6. 67 Fed. Reg. at 20,688.

7. *DOD Posts Comments to FPI Purchase Rules*, 44 GOV'T CONTRACTOR 25, ¶ 254 (July 10, 2002).

8. *Id.* Members of the House Committee on Small Businesses requested a definition of "competition" and "comparable price, quality, and time of delivery." The U.S. Chamber of Commerce requested that the council clarify that all three criteria must be met by FPI to satisfy the requirement of a comparable product. The Federal Bureau of Prisons maintained that DOD is required to obtain a waiver from FPI if the agency determines that the product is not comparable. The Defense Logistics Agency requested that micropurchases be excluded. *Id.*

9. Raya Wideonoja, *Defense Department Gets Earful on Prison Contract Rule*, GovExec.com (June 25, 2002), at <http://www.govexec.com/dailyfed/0602/062502r2.htm>.

10. Comp. Gen. B-290546, July 15, 2002, 2002 CPD ¶ 112.

11. *Id.* at 2. The Corps began working with UNICOR to provide furniture for the Amphibious Warfare School at the Quantico Marine base in Virginia. *Id.* The requirement to conduct market research was enacted before the purchase of the UNICOR products.

12. *Id.*

officer concluded that UNICOR's price and delivery terms were not comparable and issued a purchase order to a FSS vendor.¹³ UNICOR challenged the contracting officer's finding and the competitive procedures the agency used to award the contract. The agency alleged that UNICOR's enabling statute required the arbitration board to resolve the dispute and moved to dismiss.¹⁴

The GAO agreed with the agency. UNICOR's enabling statute specifically vested the arbitration board with authority to resolve disputes involving price, quality, character, or suitability of UNICOR products. The GAO held that the board retained authority to resolve the dispute because the statute requiring the comparability determination did not specifically alter the board's arbitration authority. The new requirement applicable to UNICOR purchases did not exclude DOD purchases from the board's authority.¹⁵ The GAO refused to decide whether the FSS competition complied with the statute's competitive procedures requirement until the arbitration board decides the comparability issue.¹⁶

Compare Past Performance, Too

The Civilian Agency Acquisition Council (CAAC) and the DARC proposed an amendment aimed at improving FPI's customer satisfaction, specifically its performance in delivery, price, and quality.¹⁷ Federal customers would rate FPI's performance and compare its performance to private industry performance. The information will provide FPI with feedback and agencies with information for future source-selection determinations.¹⁸

Treat It like a Commercial Item

The DOD issued an interim rule on 6 December 2001 authorizing commercial item treatment for certain performance-based service contracts and task orders.¹⁹ The interim rule requires the contract or task order to be a firm-fixed priced acquisition, have a value not exceeding five million dollars, specify each task the contractor must perform, define each task in measurable mission-related terms, and identify the specific end products or output the contractor must achieve for each task. The rule also requires the contractor to provide similar services to the general public at the same time and under similar terms and conditions as the contract or task order.²⁰

Coordinated Effort

On 20 March 2002, the CAAC and the DARC issued a proposed rule amending the Federal Acquisition Regulation to update the clause regarding contract terms and conditions required to implement statutes or Executive Orders for commercial items.²¹ The new clause ensures statutes enacted after the Federal Acquisition Streamlining Act of 1994 (FASA)²² contain the applicable civil or criminal penalties and specifically cite their applicability to commercial items included in the list. The clause now includes pre-FASA clauses and alternatives, and excludes any post-FASA items that no longer apply.²³ "The date of each clause is added to the list to identify what revision of the listed clause applies when the clause is added to a contract."²⁴

13. *Id.*

14. *Id.* at 3; see 18 U.S.C. § 4124(b) (2000). The statute provides that "[d]isputes as to the price, quality, character, or suitability of such products shall be arbitrated by a board consisting of the Attorney General, the Administrator of General Services, and the President, or their representatives. Their decision shall be final and binding upon all parties." *Id.*

15. *Fed. Prison Indus.*, 2002 CPD ¶ 112, at 3.

16. *Id.* at 4.

17. Past Performance Evaluation of Federal Prison Industries Contracts, 67 Fed. Reg. 55,680 (Aug. 29, 2002) (to be codified at 48 C.F.R. pts. 8, 42).

18. *Id.*

19. Performance-Based Contracting Using Federal Acquisition Regulation Part 12 Procedures, 66 Fed. Reg. 63,335 (Dec. 6, 2001) (codified at 48 C.F.R. pts. 212, 237).

20. 66 Fed. Reg. at 55,680.

21. Contract Terms and Conditions Required to Implement Statute or Executive Orders—Commercial Items, 67 Fed. Reg. 13,076 (Mar. 20, 2002) (codified at 48 C.F.R. pt. 52).

22. Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3409 (codified at scattered sections of 10 U.S.C. and 41 U.S.C.).

23. In addition, the new language adds pre-FASA clauses and alternates that were inadvertently left off the former list. 67 Fed. Reg. at 13,076.

24. *Id.*

Whose Responsibility Is It?

On 31 May 2002, the DOD issued a final rule amending the Defense Federal Acquisition Regulation Supplement²⁵ to clarify responsibilities regarding commercial item determinations for subcontractors.²⁶ The rule requires contractors to determine “whether a particular subcontract item meets the definition of a commercial item.”²⁷ When the administrative contracting officer (ACO) conducts a contractor purchasing system review (CPSR), the ACO will review the adequacy of the contractor’s documented rationale for the commercial item determination.²⁸ The ACO should use reasonable business judgment to determine if a subcontract item complies with the commercial item definition.²⁹ The requirement does not affect the contracting

officer’s responsibilities or determinations regarding obtaining cost or pricing data.³⁰

Just Minor Updates

The CAAC and the DARC issued a final rule on 20 March 2002, revising the commercial item Standard Form 1449. The final rule makes minor revisions: adding a block to indicate HUBZone set-asides, substituting the NAICS code for the SIC code, inserting a notation that award is made only on items specifically listed, and adding a block in the government’s receiving report area.³¹ Major Davis.

25. U.S. DEP’T OF ARMY, DEFENSE FEDERAL ACQUISITION REG. SUPP. (July 2002).

26. Subcontract Commerciality Determinations, 67 Fed. Reg. 38,023 (May 31, 2002) (to be codified at 48 C.F.R. pt. 244).

27. *Id.*; see FAR, *supra* note 5, at 2.101 (defining the term “commercial item”).

28. 67 Fed. Reg. at 38,023. Section 44.302 of the FAR requires the administrative contracting officers to conduct a review to determine if a CPSR review is needed when a contractor’s sales to the government are expected to exceed \$25 million during the next twelve months. FAR, *supra* note 5, at 44.302.

29. *Id.*

30. See FAR, *supra* note 5, at 15.403.1.

31. U.S. Gen. Servs. Admin., SF 1449, Solicitation/Contract/Order for Commercial Items, 67 Fed. Reg. 13,049 (Mar. 20, 2002) (amending 28 C.F.R. pts. 1, 53).

Electronic Listing of Multiple Agency Use Contracts

In February 2002, the Federal Acquisition Regulatory Council (FARC) issued a proposed amendment to the Federal Acquisition Regulation (FAR)¹ that would require electronic listings of multiple agency use contracts.² The proposed rule requires contracting activities to provide the information on-line within ten days of the award of a procurement instrument intended for use by multiple agencies.³ The Web site would include information about the procurement instrument, placing orders, and other general information. The FARC proposes placing the new subpart in Federal Acquisition Regulation part 5, Publicizing Contract Actions, but is also considering inserting this database in FAR part 4, Administrative Matters, and FAR part 7, Acquisition Planning.⁴

The Department of Defense Acquisition Council (DDAC) and the Civilian Agency Acquisition Council (CAAC) issued a final rule that requires the development of acquisition plans and an information technology acquisition strategy for orders placed under a Federal Supply Schedule (FSS) contract.⁵ All "information technology acquisitions shall comply with capital planning and investment control requirements"⁶ and *Office of Management and Budget (OMB) Circular A-130*.⁷ The rule excludes FSS orders using simplified acquisitions procedures under FAR part 13 and small business programs under FAR part 19.⁸ Although orders placed under Multiple Award Schedule⁹ (MAS) procedures are still considered full and open competition,¹⁰ FFS orders are not exempt from the fair opportunity competition requirement. Contracting officers must ensure that all awardees have a fair opportunity¹¹ to compete for a delivery-order or task-order exceeding \$2500 unless an exception applies.¹² Contracting officers must also document the rationale for the order, the price, any tradeoffs, and the basis for the award. The contracting officer must also have a documented rationale for authorizing fair opportunity or logical follow-on

1. GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. pt. 5 (July 2002) [hereinafter FAR].

2. Electronic Listing of Acquisition Vehicles Available for Use by More Than One Agency, 67 Fed. Reg. 7256 (proposed Feb. 15, 2002) (to be codified at 48 C.F.R. pt. 5) (amending FAR pt. 5).

3. 67 Fed. Reg. at 7257. The contracting agency must make the information available on the GovWide Contracts Web Site, <http://www.arnet.gov/gwac/gov-wide.html>. *Id.*

4. *Id.*

5. The final rule is designed to:

(1) increase attention to modular contracting principles to help agencies avoid unnecessarily large and inadequately defined orders;

(2) facilitate information exchange during the fair opportunity process so that contractors may develop and propose solutions that enable the government to award performance-based orders; and

(3) revise existing documentation requirements to address tradeoff decisions as well as the issuance of sole-source orders as logical follow-ons to orders already issued under the contract.

Final Rule Amending Various Provisions of the Federal Acquisition Regulation (FAR) to Further Implement Subsections 804(a) and (b) of the National Defense Authorization Act for Fiscal Year 2000, 67 Fed. Reg. 56,117 (Aug. 30, 2002) (to be codified at scattered sections of 48 C.F.R.).

6. See 40 U.S.C. § 1422 (2000). The capital planning requirements establish a comprehensive approach for executive agencies to improve the acquisition and management of information resources. *Id.*

7. OFFICE OF MANAGEMENT AND BUDGET, OMB CIRCULAR A-130, MANAGEMENT OF FEDERAL INFORMATION RESOURCES, ESTABLISHED POLICY FOR THE MANAGEMENT OF FEDERAL INFORMATION RESOURCES, 67 Fed. Reg. 56,119 (amendment of July 17, 1996), available at <http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html>.

8. Except for the provisions at FAR section 13.303-2(c)(3), which define with whom contracting officers may establish blanket purchase agreements. 67 Fed. Reg. at 56,119.

9. The Multiple Award Schedules are also called the Federal Supply Schedule.

10. 67 Fed. Reg. at 56,117.

11. *Id.* at 56,118.

exceptions.¹³ The new rules will increase contracting officers' procedural responsibilities.

Competition Required Among FSS Vendors

The Defense Acquisition Regulations Council (DARC) recently proposed an amendment the Defense Federal Acquisition Regulation Supplement¹⁴ (DFARS) to require competition for FSS service contracts exceeding \$100,000.¹⁵ The amendment implements section 803 of the National Defense Authorization Act for Fiscal Year 2002.¹⁶ The rule requires award on a competitive basis unless an exception¹⁷ applies or a statute expressly authorizes or requires the purchase from another source.

A competitive basis requires agencies to give contractors fair notice of the intent to purchase, a description of the work the contractor must perform, and the basis for selection. All responding contractors must have a fair opportunity to submit an offer and have that offer fairly considered. Alternatively, a competitive basis requires the contracting officer to notify as many contractors on the schedule as practicable and receive offers from at least three qualified contractors.¹⁸ If fewer than

three qualified contractors submit offers, the contracting officer must determine whether he could identify additional qualified contractors through reasonable efforts. The contracting officer must provide written documentation when he determines that reasonable efforts would not reveal additional qualified contractors.¹⁹

Contracting officers are authorized to establish single and multiple blanket purchase agreements (BPAs) against the FSS if they meet the competitive basis and fair notice requirements. In addition, for single BPAs, the statement of work must define the task and establish a firm-fixed price for identified tasks or services. For multiple BPAs, all awardees must receive the statement of work and selection criteria on the FSS before the contracting officer places an order.²⁰

It's Not Incidental

The CAAC and the DARC recently issued a final rule governing incidental purchases from FSS vendors and disputes with FSS vendors.²¹ The final rule authorizes incidental orders from a FSS BPA or a task or delivery order if the agency follows the non-FSS acquisition rules. The contracting officer

12. *Id.* The statutory exceptions are:

- (i) the agency need for supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays;
- (ii) only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized;
- (iii) the order must be issued on a sole source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order; or
- (iv) it is necessary to place an order to satisfy a minimum guarantee.

FAR, *supra* note 1, at 16.5505(2).

13. 67 Fed. Reg. at 56,120. The contracting officer must identify the basis for the fair opportunity process exception. The follow-on exception requires the contracting officer to describe why the relationship between the initial order and the follow-on order is logical to the follow-on. *Id.*

14. U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. (July 2002) [hereinafter DFARS].

15. Competition Requirements for Purchase of Services Under Multiple Award Contracts, 67 Fed. Reg. 15,351 (Apr. 1, 2002) (to be codified at 48 C.F.R. pts. 208, 216) (amending DFARS, *supra* note 14, at 208, 216). The rule eliminated the requirements of FAR section 8.404(b)(2), Ordering Procedures for Optional Use Schedules, for Service Contracts Exceeding \$100,000. *See* 67 Fed. Reg. at 15,351. The rule also implements the procedures of FAR section 8.404(b)(3)(i), Orders exceeding the maximum order threshold; and FAR section 8.404(b)(7), Documentation. 67 Fed. Reg. at 15,352.

16. National Defense Authorizations Act for Fiscal Year 2002, Pub. L. No. 107-107, 115 Stat. 1012 (2001).

17. The contracting officer may waive the competitive basis requirement if one of the exceptions at FAR section 16.505(b)(2)(i)-(iii) applies. 67 Fed. Reg. at 15,352.

18. *Id.* The rule requires the contracting officer to make a written determination. *Id.*

19. *Id.*

20. *Id.*

21. Federal Supply Order Disputes and Incidental Items, 67 Fed. Reg. 43,514 (June 27, 2002) (to be codified at 48 C.F.R. pts. 8, 51) (amending FAR, *supra* note 1, at 8.401, 8.405-7).

must also determine that the price of the incidental items is fair and reasonable, clearly identify the non-FSS items on the order, and include all applicable FSS clauses.²²

The final rule also adds a section regarding the disposition of disputes under the FSS. The ordering contracting officer may issue a final decision or refer the dispute to the schedule contracting officer. The rule refers disputes relating to contract terms and conditions to the schedule contracting officer. The rule also encourages parties to use alternative dispute resolution to the maximum extent practicable. Contracting officers are authorized to appeal final decisions to the agency's Board of Contract Appeals or the U.S. Court of Federal Claims.²³

This Is Why We Have the Rules

In *Reep, Inc.*,²⁴ the General Accounting Office (GAO) recently held that agencies need not conduct competitive acquisitions when making FSS purchases if the awardee is the vendor providing the best value to the government at the lowest overall cost. The GAO sustained the FSS protest in *Reep* because the agency awarded a sole-source delivery order to the incumbent vendor, even though a vendor on another schedule provided the same service at a lower price.²⁵

In March 2001, the 5th Special Forces Group (SFG) awarded Worldwide a one-year delivery order contract under the FSS for language training services. On 4 March 2002, the SFG issued a request for quotes, but a protest caused the SFG to take corrective action and issue a new solicitation.²⁶ The SFG issued two FSS delivery orders to Worldwide on 15 March 2002 and 3 June 2002 to meet the ongoing need for language training services. Worldwide was the only vendor on that FSS schedule. Other vendors on another FSS schedule, including

Reep, provided language training services at a lower price. Reep protested the SFG's failure to consider vendors on the alternate FSS.²⁷

The GAO held that the SFG must consider reasonably available information to ensure that it meets the statutory obligation to obtain the best value at the lowest overall cost when placing orders under the FSS.²⁸ Reviewing the prices of the vendors on the other FSS would have satisfied the statutory requirement.²⁹ The GAO found that the agency failed to comply because it had actual knowledge of vendors on the other FSS and failed to provide a unique basis for Worldwide's language training services.³⁰ Under the new DFARS rule regarding the acquisition of services exceeding \$100,000, contracting officers are required to provide FSS vendors notice of the RFQ and award on a competitive basis.³¹

Army Mandates Use of Blanket Purchase Agreement (BPA)

Effective 1 October 2002, the Army Contracting Agency (ACA) mandated the use of a Department of the Army BPA for office supply purchases using the government purchase card. Installations in the continental United States must use one of twelve vendors to purchase office supplies if their self-service supply center is unable to fill their requirements. Installations outside the continental United States must use the BPA if a listed vendor can meet their delivery requirements. The vendors were selected from existing General Service Administration (GSA) FSSs to promote the statutory preference to use GSA FSSs and to promote small or disadvantaged businesses.³² The vendors will automatically substitute statutorily mandated products under the Javits-Wagner-O'Day (JWOD) program when an agency places an order. The goal is to "standardize the Army's method of procuring office products, offer better prices

22. Contracting officers must follow the applicable regulations of FAR part 5, Publicizing; FAR part 6, Competition Requirements; FAR part 12, Acquisition of Commercial Items, Contracting Methods; FAR parts 13, 14, and 15; and FAR part 19, Small Business Programs. 67 Fed. Reg. at 43,515.

23. *Id.* The schedule contracting officer must receive notice of the ordering contracting officer's final decision. The contracting officer must notify the schedule contracting officer of the referral. *Id.*

24. B-290665, 2002 U.S. Comp Gen. LEXIS 137 (Sept. 17, 2002).

25. *Id.* at *5.

26. *Id.* at *2.

27. *Id.* at *3. The SFG did not issue a solicitation or request quotes from FSS vendors. *Id.*

28. *Id.* at *3-4.

29. *Id.* at *4.

30. *Id.* at *5.

31. Competition Requirements for Purchases of Services Under Multiple Award Contracts, 67 Fed. Reg. 15,351 (Apr. 1, 2002) (to be codified at 48 C.F.R. pts. 208, 216).

32. Memorandum, Acting Director of the Army Contracting Agency, to Heads of Contracting Activities, subject: Mandatory Use of Blanket Purchase Agreements (BPAs) for Office Products for the Army (26 Sept. 2002). "Historically, the Army has purchased approximately \$100 million in office supplies annually." *Id.*

(by maximizing quantity discounts) and enhance the Army's commitment to support small businesses and the JWOD pro-

gram.”³³ The DOD's Electronic Mall hosts the BPAs.³⁴ Major Davis.

33. 41 U.S.C. §§ 46-48(c) (2000). One of the goals of the BPA is to “enhance the Army's commitment to the JWOD Program.” *Id.*

34. *Id.* The DOD Electronic Mall is available at <https://email.prod.dodonline.net/scripts/EMStoresRelatedSites.asp>.

Electronic Commerce

E-Government

Federal agencies introduced numerous electronic government (E-Government) initiatives this year. President Bush issued a memo reiterating that E-Government is a core feature of government reform and encouraged coordinated E-Government initiatives.¹ The Senate passed legislation creating an E-Government position in the Office of Management and Budget (OMB).² The E-Government Task Force implemented E-Government initiatives to address redundant and overlapping agency actions.³ The General Services Administration (GSA) redesigned a key component of E-Government, FirstGov, to allow direct transactions between the government and the public.⁴ The OMB plans to centralize the rule-making services of several agencies on-line with FirstGov.com. The integration should save the federal government \$70 million in an eighteen-month period.⁵ The OMB and the Department of Labor launched a Web Site, GovBenefits, to give easy access to information about government programs.⁶ The GSA released the Certificate Arbitrator Module software on an open-source basis. The software is “designed to make it easier for the public and the commercial sector to securely conduct business with the government electronically.”⁷ The General Accounting

Office (GAO) announced plans to implement electronically filed bid protests as part of the GAO’s E-Gov initiatives.⁸ The Department of Energy (DOE) used digital verification to send a 9500-page proposal.⁹ “It is estimated the DOE saved nearly one million dollars in reproduction and storage costs by e-mailing and electronically signing the proposal.”¹⁰ Finally, the Administrator for Federal Procurement Policy launched the government-wide past performance retrieval database.¹¹ The Web site is an E-Government initiative to eliminate “collection redundancies.”¹²

Electronic Request for Payment

The Department of Defense (DOD) proposed amending the Defense Federal Acquisition Regulation Supplement¹³ to require contractors to submit payments electronically and the DOD to process those payments electronically.¹⁴ The rule would authorize the Secretary of Defense to exempt cases if the electronic requirement would be unduly burdensome.¹⁵ The DOD delayed implementation of the rule until 1 October 2002.¹⁶

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1. Memorandum from The President of the United States to the heads of Executive Departments and Agencies, subject: Electronic Government’s Role in Implementing the President’s Management Agenda (July 7, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020710-6.html>.
 2. Maureen Sirhal, *Senate Passes Bill to Create E-Government Office*, GovExec.com (June 28, 2002), at <http://www.govexec.com/dailyfed/0602/062802tdl.htm>; see S. 803, 107th Cong. (2002).
 3. U.S. Office of Mgmt. and Budget, *E-Gov Initiatives* (Sept. 22, 2002), at <http://www.arnet.gov/ego/index.html>.
 4. *Cheney Announces FirstGov Overhaul*, 44 GOV’T CONTRACTOR 9, ¶ 92 (Mar. 2, 2002).
 5. *Administration’s E-Gov Initiative Takes Another Step Forward*, 44 GOV’T CONTRACTOR 19, ¶ 188 (May 15, 2002).
 6. Press Release, U.S. Dept. of Labor, *GovBenefits Web Site Officially Launched, WWW.GovBenefits.gov Provides Easy Access to Benefit Information; Streamlines Bureaucracy* (Sept. 19, 2002), at <http://www.dol.gov/opa/media/press/opa/OPA2002256.html>.
 7. *GSA Announces “Open Source” Release of PKI-related Software*, 43 GOV’T CONTRACTOR 37, ¶ 383 (Oct. 10, 2002).
 8. *E-Filing of Bid Protests, Rule Revamp on Tap at GAO*, 44 GOV’T CONTRACTOR 5, ¶ 50 (Feb. 6, 2002).
 9. *Id.* The authentication services used enclosed the “document in a security barrier that prevents undetected alterations.” *Id.*
 10. *Id.*
 11. *Government-Wide Past Performance Retrieval Database Launched*, 44 GOV’T CONTRACTOR ¶ 281 (July 24, 2002).
 12. *Id.*
 13. U.S. DEP’T OF DEFENSE FEDERAL ACQUISITION REG. SUPP. (June 2001) [hereinafter DFARS].
 14. Electronic Submission and Processing of Payment Requests, 67 Fed. Reg. 38,057 (proposed May 31, 2002) (to be codified at 48 C.F.R. pts. 232, 252). Specifically, the rule requires contractors to submit requests for contract financing and invoice payment in electronic form. The rule requires the DOD to receive payment requests electronically and to process payment requests and supporting documentation electronically. *Id.*
 15. *Id.*
 16. Delay in the Implementation of 10 U.S.C. § 227; Electronic Submission and Processing of Claims for Contract Payments, 66 Fed. Reg. 43,841 (Aug. 21, 2001). The original implementation date was 30 June 2002. *Id.*

Reverse Auctions

Agencies continued to use on-line reverse auctions to procure goods and services. The Air Force Center for Environmental Excellence (AFCEE) used a reverse auction to procure the construction of a motorized security gate.¹⁷ The AFCEE notified contractors in advance and issued log-in identification and passwords to access the auction Web site.¹⁸ Contractors submitted proposals in advance, and contractors with unacceptable proposals were excluded from the Web site.¹⁹ The bidding process continued until there were no bids within a five-minute period, and ended in forty-eight minutes.²⁰

When Will It End?

Last year's *Year in Review* emphasized the importance of thoroughly reviewing electronic commerce reverse auction requests for proposals (RFP) to avoid clauses that could indefinitely extend auctions.²¹ In *Royal Hawaiian Movers, Inc.*,²² the GAO denied a protest challenging corrective action taken as a result of an ambiguous electronic commerce RFP. The Department of the Navy issued an RFP for the movement of containers between points in Oahu, Hawaii. The RFP included a reverse auction after the receipt of initial price proposals.²³ The auction was to begin at 0900 hours and last for sixty minutes, but receipt of revised offers within the last five minutes of the auction extended the auction for an additional five minutes.²⁴ The RFP authorized fifty extensions and indicated the auction would end at 1400 hours. The Navy failed to recognize that the

auction would end at 1410 hours if the bidders used all fifty extensions;²⁵ they did, and the auction ended at 1410 hours. Royal Hawaiian submitted the lowest-priced offer after 1400 hours. Pacific Express objected, because it submitted the lowest-priced offer before 1400 hours. The Navy acknowledged that the RFP was ambiguous and amended it to request revised proposals from the offerors.²⁶

Royal Hawaiian protested the amendment. Specifically, Royal Hawaiian complained that "reopening the competition after the reverse auction was not required to ensure fair competition."²⁷ Royal Hawaiian argued that there was no evidence that the RFP misled the offerors. Pacific Express knew that the auction would continue past 1400 hours because it submitted a revised offer after 1400 hours. Royal Hawaiian also complained that receipt of final proposals required it to bid against itself, resulting in fundamental unfairness to Royal Hawaiian.²⁸

The GAO stated that "an agency has broad discretion in a negotiated procurement to take corrective action where the agency determines that such action is necessary to ensure fair and impartial competition."²⁹ The Comptroller General found that reopening the competition was a reasonable corrective action because the offerors may have formulated different strategies based on a different understanding of when the auction would end.³⁰ Pacific Express did submit a revised offer after 1400 hours, but the GAO would not conclude that this meant that Pacific Express knew before 1400 hours that the auction would continue past 1400 hours.³¹ The GAO held that the RFP was patently ambiguous and that the Navy's request for revised

17. AFCEE's Internet "Reverse Auction" Receives High Marks, 44 GOV'T CONTRACTOR ¶ 301 (Aug. 7, 2002).

18. *Id.*

19. *Id.* The web site used administrative controls to lock out companies with unacceptable proposals. *Id.*

20. *Id.* The apparent low bidder, at \$39,000, was required to submit an acceptable cost proposal. If AFCEE rejected the proposal, it was authorized to accept a cost proposal from the next lowest bidder. *Id.*

21. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 31 [hereinafter *2001 Year in Review*].

22. Comp. Gen. B-288653, Oct. 31, 2001, 2001 CPD ¶ 182.

23. *Id.* at 1.

24. *Id.* at 2. The RFP authorized price revisions during the reverse auction only. *Id.*

25. *Id.*

26. *Id.* at 3.

27. *Id.*

28. *Id.*

29. *Id.* at 4.

30. *Id.* at 5; see Main Bldg. Maint., Inc., Comp. Gen. B-279191.3, Aug. 5, 1998, 98-2 CPD ¶ 47.

31. *Royal Hawaiian Movers*, 2001 CPD ¶ 182, at 5. "Another competing offeror did not submit a revised offer after 2:00 p.m." *Id.*

proposals was an appropriate corrective action.³² Although the Navy included clauses that avoided extending the auction indefinitely,³³ this experience still provides a valuable lesson—

agencies should conduct dry runs and implement all the provisions of the RFP to alleviate conflicts and ambiguities. Major Davis.

32. *Id.*

33. *2001 Year in Review*, *supra* note 21, at 28.

Affirmative Action in Government Contracting

Adarand: Supreme Court Dismisses Long-Standing Case

For several years, this publication has analyzed the *Adarand* affirmative action cases.¹ These cases began when the United States District Court for the District of Colorado held that the “DBE [Disadvantaged Business Enterprise] Program as administered by the [Central Federal Lands Highway Division] within Colorado” was constitutional.² The United States Court of Appeals for the Tenth Circuit (Tenth Circuit) affirmed the district court’s holding,³ and the United States Supreme Court remanded the case to the Court of Appeals and directed it to apply “strict scrutiny” analysis instead of the intermediate standard of review applied earlier.⁴ On remand, the Tenth Circuit reversed the district court’s decision⁵ and held that the pertinent provisions of the program were unconstitutional under a strict scrutiny analysis.⁶

The Supreme Court’s second review of the *Adarand* cases could have ended with a landmark decision for race-based initiatives in federal contracting. Instead, the Supreme Court dis-

missed the writ of certiorari as improvidently granted.⁷ The Court reasoned that the Tenth Circuit had shifted its focus from statutes and regulations pertaining to federally funded state and local highway contracts,⁸ to statutes and regulations pertaining to direct procurement of Department of Transportation (DOT) funds for highway construction on federal lands.⁹ The Court refused to address this latter issue because the Tenth Circuit had specifically held that the plaintiff lacked standing to challenge agency decisions in this area.¹⁰ The Court dismissed the writ, “effectively stalling *Adarand*’s litigation—at least for now.”¹¹

The Adarand Legacy Lingers

Race-based preferences in federal contracting continue to be an issue in spite of the dismissal of *Adarand*. In *Rothe Development Corp. v. U.S. Department of Defense*,¹² the Court of Appeals for the Federal Circuit (CAFC) vacated a district court decision that upheld the constitutionality of Section 1207 (the 1207 Program) of the National Defense Authorization Act of 1987. The 1207 Program provision at issue authorizes the Department of Defense (DOD) to raise the bids of non-Small Disadvantaged Businesses (SDBs) by ten percent to attain the five percent SDB contracting goal.¹³ The DOD’s ability to meet

1. See Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 38-41.

2. *Adarand Constructors, Inc. v. Skinner*, 790 F.Supp. 240, 244-5 (D. Colo. 1992) [hereinafter *Adarand I*]. *Adarand Constructors*, a non-Disadvantaged Business Enterprise (DBE) subcontractor at that time, filed suit claiming that the presumption that certain groups were socially and economically disadvantaged discriminates on the basis of race in violation of the federal government’s Fifth Amendment obligation not to deny anyone equal protection of the laws. See 15 U.S.C. § 637(a)(5) (2000) (defining “socially disadvantaged” as those individuals “subjected to racial or ethnic prejudice or cultural bias because of [their] identity as a member of a group without regard to individual qualities.”); see also 15 U.S.C. § 637(a)(6)(A) (2000) (defining “economically disadvantaged” individuals as those who have an impaired “ability to compete in the free enterprise system . . . due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged”).

3. *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1539 (10th Cir. 1994) [hereinafter *Adarand II*] (holding the SCC Program constitutional “because it is narrowly tailored to achieve its significant governmental purpose of providing subcontracting opportunities for small Disadvantaged Business Enterprises”). *Id.*

4. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995) [hereinafter *Adarand III*]; see Major Timothy J. Pendolino et al., *1995 Contract Law Developments—The Year in Review*, ARMY LAW., Jan. 1996, at 36 (discussing the Supreme Court’s decision to overrule its earlier decision in *Metro Broadcasting v. FCC*, 497 U.S. 547 (1990), applying an intermediate standard of scrutiny to two race-based policies of the Federal Communications Commission).

5. *Adarand Constructors, Inc. v. Pena*, 965 F.Supp. 1556 (D. Colo. 1997) [hereinafter *Adarand IV*]; see Major David A. Wallace et al., *Contract Law Developments of 1997—The Year in Review*, ARMY LAW., Jan. 1998, at 41-42 (discussing the district court’s application of the strict scrutiny standard and its holding that the subcontractor compensation clause (SCC) was not narrowly tailored to the goal of overcoming discriminatory barriers in federal highway contracts). The SCC provided a financial advantage to prime contractors that hired subcontractors who qualified as DBEs. At the time of award, contractors were obligated to presume individuals of certain races or ethnic backgrounds were socially and economically disadvantaged and therefore qualified as DBEs. *Adarand I*, 790 F.Supp. at 241-42.

6. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147 (10th Cir. 2000) [hereinafter *Adarand V*] (noting that several changes made to the SCC and DBE since the suit was first filed made those provisions sufficiently narrowly tailored); see also Major Louis A. Chiarella et al., *Contract and Fiscal Law Developments of 2000—The Year in Review*, ARMY LAW., Jan. 2001, at 41-42 (discussing the Tenth Circuit’s decision in *Adarand V*).

7. *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 111 (2001) [hereinafter *Adarand VI*].

8. See Transportation Equity Act for the 21st Century (TEA-21), Pub. L. No. 105-178, § 1101(b)(1), 112 Stat. 107, 113 (1999) (codified at 49 C.F.R. pt. 26).

9. See 15 U.S.C. § 637(d)(4)(E) (2000) (providing federal agencies the authority to encourage subcontracting opportunities for DBEs).

10. *Adarand V*, 228 F.3d at 1160. The Supreme Court noted that *Adarand*’s original petition for certiorari did not contest the Tenth Circuit’s holding that *Adarand*’s standing was limited to a challenge of TEA-21. *Adarand VI*, 534 U.S. at 107-08.

11. See *Adarand: High Court Decides Not To Decide*, 43 GOV’T CONTRACTOR 45, ¶ 461 (Dec. 5, 2001) (discussing the Supreme Court’s dismissal).

12. 262 F.3d 1306 (2001). See also *2001 Year in Review*, *supra* note 1, at 41-43.

the five percent SDB contracting goal may explain the reason the issue is moot, at least to some.¹⁴

In *Sherbrooke Turf Inc. v. Minnesota Department of Transportation*,¹⁵ the United States District Court for the District of Minnesota held that the latest version of the affirmative action program for federally funded highway contractors survives the strict scrutiny analysis prescribed in *Adarand III*.¹⁶ Sherbrooke Turf, Inc. (Sherbrooke), a firm owned and operated by caucasian males, provides landscaping services for land adjacent to highways. Sherbrooke submitted subcontracting bids on two federally assisted, state-administered highway projects. In both instances, the prime contractor awarded the contract to a DBE subcontractor who submitted a higher bid in the case of one project, and omitted services that were often necessary in the case of another.¹⁷ Sherbrooke sued, claiming that the Minnesota Department of Transportation's (MnDOT) DBE program violated the Equal Protection Clause of the U.S. Constitution.¹⁸

Referring to a congressional "Benchmark Study," the *Sherbrooke* court held that Minnesota's implementation of the federal program met the "compelling interest" requirement because "[t]he record makes clear that Congress had a sufficient evidentiary basis on which to conclude that the persistence of racism and discrimination in highway subcontracting warranted a race-conscious procurement program."¹⁹ The court also noted several features of the program that demonstrate its narrow tailoring to serve the compelling government interest of addressing the persistence of racism and discrimination in highway subcontracting. First, the program emphasized the use of race-neutral measures to meet the MnDOT goals.²⁰ Second, the program was limited in duration.²¹ Third, the program barred any "rigid quotas," permitted states to deviate from the aspirational national ten percent goal, and permitted states to apply for exemptions.²² Last, the plaintiff failed to show that its inability to secure an award on either project was related to the MnDOT program.²³

13. The 1207 Program sets a statutory goal for the DOD of five percent participation by socially and economically disadvantaged businesses. See 10 U.S.C. § 2323 (2000). The 1207 Program points to section 8(d) of the Small Business Act in order to define socially and economically disadvantaged businesses. See also 10 U.S.C. § 2323 (a)(1)(A); 15 U.S.C. § 637(d). The ten percent price evaluation program is implemented by the Federal Acquisition Regulation (FAR). GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. 19.11 (July 2002) [hereinafter FAR]; see also Inter-Con Sec. Sys., Inc., B-290493, B-290493.2, 2002 U.S. Comp. Gen. LEXIS 121 (Aug. 15, 2002) (interpreting the Foreign Relations Authorization Act, 22 U.S.C. § 4864 (2000), as allowing a ten-percent evaluation price preference for U.S. security firms bidding on contracts for U.S. Foreign Missions abroad, even if they are subsequently acquired by foreign corporations).

14. For the third consecutive year, the price evaluation adjustment for SDBs is suspended for DOD procurements because the DOD exceeded its five percent goal for contract awards to SDBs. See 10 U.S.C. § 2323(e)(3)(B)(ii). The suspension applies to all solicitations from 24 February 2002 to 23 February 2003. See *Small Disadvantaged Business: DOD Met 5% SDB Goal in FY 2001, Must Suspend Price Adjustment for 1 Year*, 77 BNA FED. CONT. REP. 7, at 185 (Feb. 19, 2002). But see *Small Disadvantaged Business: Kerry, Bond Urge Administration To Consider Reinstating SDB Set-Asides*, 77 BNA FED. CONT. REP. 16, at 464 (Apr. 23, 2002) (discussing two U.S. senators' concern for the decrease in the percentage of federal contract dollars awarded to SDBs, and their request to the Small Business Administration (SBA) to revisit the SDB programs, which the Clinton administration scaled back considerably in response to the 1995 *Adarand III* decision requiring strict scrutiny of race-preference statutes). The decrease in the percentage of federal contract dollars is consistent with a report by the SBA's Office of Advocacy, which concluded that although minorities have made significant gains in the small business sector, significant obstacles continue to impede the growth of SDBs. See U.S. SMALL BUSINESS ADMIN., MINORITIES IN BUSINESS (2001), available at <http://www.sba.gov/advo/stats/min01.pdf>.

15. No. 00-CV-1026 (JMR/RE), 2001 U.S. Dist. LEXIS 19565 (D. Minn. Nov. 14, 2001 Nov. 14, 2001).

16. *Id.* at *34.

17. *Id.* at *9.

18. *Id.* at *10. The court described MnDOT's DBE program as follows:

MnDOT has set an 11.6% overall goal for DBE participation. Under Part 26 of the federal regulations, it determined it could meet 2.6% of its participation goal using race and gender neutral means, including selecting DBEs based on the lowest bid; the remaining 9% of its goal was to be met through contract goals. To implement these highway contracting goals, Minnesota required each prime contract-bidder to provide evidence showing it either subcontracted to DBEs in order to meet the contract goal, or engaged in a good faith effort to meet it.

Sherbrooke Turf, 2001 U.S. Dist. LEXIS 19,565, at *8 (citing 49 C.F.R. pt. 53 (2002)).

19. *Id.* at *18.

20. *Id.* at *22.

21. *Id.* at *23-24. Specifically, the DBE provision of the program expires in 2004. Furthermore, the program is automatically discontinued when a participating state meets its annual overall goals through race-neutral means in two consecutive years. See 49 C.F.R. § 26.51(f)(3).

22. *Id.* at *26-27. The court characterized Sherbrooke's argument that Minnesota's decision to opt into the program was proof of the state's "inflexibility" as "specious." The court reasoned that such logic would lead to the conclusion that opting out of the program is the "only ultimate proof a state could offer to show flexibility." *Id.* at *27.

23. *Id.* at *31.

Thus far, *Sherbrooke* has not percolated up to the Supreme Court. The *Adarand VI* dismissal assures that the plaintiff in *Sherbrooke* will remain focused on federally funded projects that are delegated to state and local governments. While some state and local governments wrestle with harmonizing race-conscious measures with *Adarand*'s strict scrutiny analysis, others may simply avoid the issue altogether by eliminating the programs that include race-conscious provisions.²⁴

It's All in the Classification

Unlike the strict scrutiny analysis required for race-based classifications, statutory preferences based on "political" classifications are subject to a rational-basis analysis.²⁵ This distinction was helpful in *American Federation of Government Employees (AFL-CIO) v. United States (AFGE)*,²⁶ where a Native American firm received an award of a civil engineering contract pursuant to an exemption under section 8014 of the 2000 Defense Appropriations Act.²⁷ *AFGE* involved two civilian employees at Kirtland Air Force Base whose positions were eliminated when the Air Force awarded a contract to a qualified firm under Native American ownership. The employees-plaintiffs alleged that the Section 8014(3) exemption was unconstitutional because it denied them the opportunity to compete for the award in a public-private cost evaluation.²⁸ The plaintiffs also alleged that the exemption was not narrowly tailored to serve a compelling government interest because non-Native

Americans who owned forty-nine percent of a Native American-owned firm would also benefit from the preference.²⁹

The court disagreed with the plaintiffs' premise that the preference was a racial classification subject to strict scrutiny analysis. The court characterized the preference for Native Americans as one involving the treatment of a "political" rather than a "racial" group.³⁰ The "political" characterization was based on Congress's constitutional powers to regulate commerce with Indian Tribes³¹ and the "legislative arm's unique authority to legislate on behalf of tribally affiliated Indians as a politically-defined group."³² The court reasoned that "political" classifications were subject to rational basis analysis and concluded that "[n]o reasonable trier of fact could find, looking at all the evidence, including the history, with all references in favor of the plaintiffs, that the United States' trust obligation and self-determination of Native Americans are not reasonably accomplished by enacting the section 8014(3) preference."³³

Small Business

Dealing Direct

On 14 March 2002, the DOD issued an interim rule³⁴ amending the Defense Federal Acquisition Regulation Supplement that permits the DOD to bypass the SBA and contract directly with SDBs on behalf of the Small Business Administration (SBA).³⁵ The interim rule implements a partnership agreement

24. See, e.g., *Affirmative Action: City of Charlotte Scraps Set-Aside Program in Face of Lawsuit Challenging Constitutionality*, 77 BNA FED. CONT. REP. 3, at 65 (Jan. 22, 2002) (discussing the Charlotte, North Carolina, City Council's decision to drop its program designed to boost participation by women and minorities in local building construction contracts). "According to City Attorney DeWitt McCarley, the city council voted Jan. 14 [2002] to scrap its program after a local construction company, backed by the Southeastern Legal Foundation (SLF), challenged its constitutionality in federal court." *Id.*

25. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955).

26. 195 F. Supp. 2d 4 (D.D.C. 2002).

27. Section 8014 of the Defense Appropriations Act for Fiscal Year 2000 provides in part that "no funds shall be available to convert to contractor performance an activity or function of the DOD that is performed by more than ten DOD civilian employees until a most efficient and cost effective organization analysis (MEO) is completed on the activity or function." Defense Appropriations Act for Fiscal Year 2000, Pub. L. No. 106-79, § 8014(3), 113 Stat. 1212, 1234 (1999). The statute creates an exemption for firms under fifty-one percent Native American ownership. See *id.*

28. *AFGE*, 195 F. Supp. 2d at 14-15.

29. *Id.* at 17-18.

30. *Id.* at 18. The *AFGE* court easily extended the "Native American" preference to a "Native Alaskan" preference, and then to the awardee, Chugach, which was owned by two Native Alaskan-owned corporations. *Id.* at 21-23. Failure to prove its status as a Native Alaskan firm could have resulted in a different conclusion. See, e.g., *Colorado Constr. Corp.*, B-290960, 2002 Comp. Gen. LEXIS 133 (Sept. 6, 2002) (holding that an agency reasonably rejected a bid submitted in response to a Native American set-aside solicitation, when the documentation raised questions about the bidder's eligibility as a Native American enterprise). The government, of course, could sue any firm that falsely certifies itself to be an enterprise entitled to any preference. See generally *Small Disadvantaged Businesses: DOJ Files Lawsuit Against California Firms For Masquerading as Minority-Owned*, 76 BNA FED. CONT. REP. 21, at 617 (Dec. 11, 2001) (discussing a Department of Justice lawsuit against three California construction companies their owners, whom it accused of falsely certifying the companies as SDBs).

31. See U.S. CONST. art. I, § 8, cl. 3.

32. *AFGE*, 195 F. Supp. 2d at 18.

33. *Id.* at 24. The preference for Native American-owned firms is discretionary, not mandatory. In *Deponte Invs., Inc.*, Comp. Gen. B-288871; B-288871.2, Nov. 26, 2001, 2002 CPD ¶ 9, the GAO held that a protestor's offer was not entitled to a preference for Native American-owned firms where the solicitation did not provide for a preference. *Id.*

between the DOD and the SBA that replaces a memorandum of understanding in effect since 6 May 1998. The authority to bypass the SBA expires on 30 September 2004. The SBA will continue to determine eligibility under the SDB program³⁶ and to resolve appeals.³⁷

To Set Aside Or Not To Set Aside

The Federal Acquisition Regulation (FAR) requires set-aside procurements for small businesses when there is a reasonable expectation that the agency will obtain offers from at least two responsible small businesses. The FAR does not require agencies to use any particular technique when assessing small business availability; however, agencies must base their assessments on sufficient facts to establish their reasonableness.³⁸ Such were the circumstances in *Quality Hotel Westshore*; *Quality Inn Busch Gardens*.³⁹ In *Quality Hotel*, the agency took several steps before deciding to issue a Request for Proposals (RFP) on an unrestricted basis.⁴⁰ The contracting officer conducted a market survey, including an Internet search on a SBA-maintained Web Site.⁴¹ The contracting officer also coordinated with the local SBA office, which could not identify any small business sources.⁴² The Army's small business specialist, the local SBA representative, and eventually the General Accounting Office (GAO), found that the contracting officer's decision to keep the requirement "full and open" was reasonable.⁴³

Although an agency "may" review a large business proposal submitted under a cascading set-aside preference, it is not "required" to view the proposal if the agency achieves sufficient small business competition under the solicitation.⁴⁴ In *Carriage Abstract*, the Department of Housing and Urban Development (HUD) awarded contracts to three small businesses for real estate closing services in different geographic areas. The incumbent-protestor, a large business, argued that HUD was required to evaluate its proposal because it offered a historically lower price than two of the awardees.⁴⁵ The GAO disagreed, noting that the protestor provided no legal support for its contention. The GAO accepted HUD's explanation "that such [a cascading set-aside] approach promotes the interests of small business concerns and also provides the agency with an efficient means to continue the procurement in the event that sufficient small business participation is not realized."⁴⁶

No Monkey Business With Small Business—Got It?

Carriage Abstract will do little to assuage those who believe federal agencies are not doing enough to include small businesses. On 15 May 2002, the House of Representatives Small Business Committee Democrats released a 327-page report, grading the performance of federal agencies on small business contracting.⁴⁷ The report gave "scorecards" charting the records of agencies over the past three years. The DOD was one of two agencies that received a failing grade.⁴⁸ On the same

34. Defense Federal Acquisition Regulation Supplement; DoD Pilot Mentor-Protege Program, 67 Fed. Reg. 11,435 (proposed Mar. 14, 2002) (to be codified at 48 CFR Parts 219 and 252).

35. See U.S. DEP'T OF DEFENSE, DEFENSE FEDERAL ACQUISITION REG. SUPP. 219.8 (July 1, 2002) [hereinafter DFARS].

36. The SDB Program is commonly referred to as the "Section 8 Program." The program gets its name from its location in the Small Business Act. See 15 U.S.C. § 637(a)(8)(1)(A) (2000).

37. See FAR, *supra* note 13, at 19.810.

38. *Id.* at 19.502-2(b); see, e.g., LBM, Inc., B-290682, 2002 U.S. Comp. Gen. LEXIS 138 (Sept. 18, 2002) (sustaining a protest that the agency did not consider the application of FAR 19.502-2(b) when it transferred services previously provided by small businesses to a task order under an indefinite-delivery/indefinite quantity contract).

39. Comp. Gen. B-290046, May 31, 2002, 2002 CPD ¶ 91.

40. The solicitation was for "meals, lodging and transportation for applicants processing at the military entrance processing station (MEPS) in Tampa, Florida." *Id.* at 1.

41. *Id.* at 2.

42. *Id.*

43. *Id.* at 2, 4. Only two businesses applied as small businesses—the protestors. The contracting officer found the protestors' documentation of their alleged small business status insufficient. *Id.* at 2-3.

44. *Carriage Abstract, Inc.*, B-290676, B-290676.2, 2002 U.S. Comp. Gen. LEXIS 119 (Aug. 15, 2002). "Cascading" set-aside preference refers to a solicitation that prioritizes proposals by categories. In this instance, the priorities were SDBs, small businesses, and last, all businesses regardless of status. *Id.* at *8.

45. *Id.* at *4-5. The price offered by the incumbent was \$220 per closing compared to the \$250 per closing offered by two of the awardees. *Id.*

46. *Id.* at *8.

47. See *Federal Agencies Receive Poor Grades For Small Business Contracting*, 44 GOV'T CONTRACTOR 20, ¶ 195 (May 22, 2002).

day as the release of the report, Representative (Rep.) Nydia Velazquez (D-N.Y.) “led the charge against Under Secretary of Defense for Acquisition, Technology, and Logistics Edward ‘Pete’ Aldridge at a House Small Business Committee hearing on Defense Department procurement practices affecting small businesses.”⁴⁹ Responding to Rep. Velazquez’s accusations that “no one department is ‘more responsible for the exclusion of small business’ than DOD,” Secretary Aldridge defended the DOD’s practices, stating that “approximately 88 percent of DOD’s prime contractors are small businesses.”⁵⁰ Whether the debate reflects real problems or is politically motivated,⁵¹ Congress will continue to pass legislation protecting small business interests.⁵² This is especially true today; President Bush recently issued an executive order directing federal agencies to consider the impact on small businesses whenever the agencies write new rules and regulations.⁵³

Sizing Up the Competitors

Contractors may appeal to the SBA’s Office of Hearings and Appeals (OHA) when a contracting officer denies them small business status. On 18 July 2002, the SBA issued a final rule amending its regulations governing proceedings before the OHA for size protests and challenges to North American Industry Classification System (NAICS) code designations.⁵⁴ The final rule explains the purpose of the amendments as follows:

This rule improves the appeals process by revising and clarifying procedures, particularly those on filing, service, and calculating deadlines that have proven to be “stumbling blocks,” causing additional litigation and delays; expedites certain procedures; conforms the regulations and procedures developed by case law and prevailing practice; and makes plain language revisions.⁵⁵

The changes to the regulations, which became effective on 16 September 2002, include clarifications of how to determine filing dates⁵⁶ and rules for the exhaustion of administrative remedies.⁵⁷ In addition to the amendments regarding OHA appeals, the SBA issued an interim final rule on 23 January 2002,⁵⁸ that adjusted its monetary-based small business size standards to account for a 15.8 percent inflation rate between 1994 and the third quarter of 2000.⁵⁹ The SBA estimates that this amendment, which took effect on 22 February 2002, is expected to result in “8,600 newly designated businesses” and an additional \$46.2 million worth of federal contracts to firms that will now be designated as small businesses.⁶⁰

A contractor may appeal an OHA ruling, but as one contractor discovered, a favorable ruling does not necessarily prevent the agency from awarding the contract to another firm. In *Ceres Environmental Services, Inc. v. United States*,⁶¹ the Court

48. *Id.* at 5.

49. *See Small Business: House Panel Scrutinizes DOD’s Small Business Contracting Record*, 77 BNA FED. CONT. REP. 20, at 592 (May 21, 2002).

50. *Id.*

51. A DOD spokeswoman remarked that “[i]t is unfortunate that the report is not a bipartisan effort but that of one Democrat on the committee.” *Id.*

52. *See, e.g., Small Business: House Agrees to Set 23% Prime Small Business Contracting Goal for DHS*, 78 BNA FED. CONT. REP. 5, at 135 (July 30, 2002) (discussing a bipartisan amendment to the Homeland Security Bill that would establish a twenty-three percent small business prime contracting goal for the new Department of Homeland Security). There are advocates who support increasing the twenty-three percent goal for small business prime contracting. On 18 July 2002, Senator John Kerry (D-Mass.) introduced legislation that increases the goal to thirty percent. *See Small and Disadvantaged Business Ombudsman Act*, S. 2753, 107th Cong. (2002). The bill would also expand the responsibilities of the SDB Ombudsman, requiring an annual report to Congress on small business and SDB issues. *See Small Business: Sen. Kerry to Introduce Legislation to Raise Government-Wide Small Business Goal to 30%*, 77 BNA FED. CONT. REP. 24, at 725 (June 18, 2002). On 3 September 2002, the Senate placed the bill on its legislative calendar. The bill’s status is available at <http://www.thomas.loc.gov>.

53. Exec. Order No. 13,272, 67 Fed. Reg. 53,461 (Aug. 13, 2002).

54. *See Small Business Size Regulations; 8(a) Business Development/Small Disadvantaged Business Status Determinations; Rules of Procedure Governing Cases before the Office of Hearings and Appeals*, 67 Fed. Reg. 47,244 (July 18, 2002) (amending 13 C.F.R. pts. 121, 124, 134).

55. *Id.*

56. *Id.* at 47,247 (amending 13 C.F.R. § 134.204(b)(2)).

57. *Id.* at 47,245 (amending 13 C.F.R. §§ 121.1101, 121.1102). Business may now appeal formal size determinations and NAICS code designations as a matter of right to OHA. The appellant must exhaust the OHA appeal procedure before seeking judicial review in court. *Id.*

58. *Small Business Size Standards; Inflation Adjustment to Size Standards*, 67 Fed. Reg. 3041 (Jan. 23, 2002) (amending 13 C.F.R. pt. 121).

59. The last inflation adjustment occurred on 7 April 1994. *See Small Business Size Standards; Inflation Adjusted Size Standards*, 59 Fed. Reg. 16,513 (Apr. 7, 1994) (amending 13 C.F.R. pt. 121).

60. *See Inflation Adjustment to Size Standards Will Benefit 8,600 Newly-Designated Small Businesses*, 44 GOV’T CONTRACTOR 4, ¶ 42, at 12 (Jan. 30, 2002).

of Federal Claims (COFC) vacated an OHA ruling on an NAICS classification. The protestor contended that the Department of Agriculture incorrectly classified a small business set-aside solicitation for ice storm debris removal as “Other Waste Collection” instead of “All Other Heavy Construction.”⁶² After the OHA rejected the protestor’s appeal, it filed suit in the COFC, requesting that the court enjoin the award and grant a judgment declaring that the “All Other Heavy Construction” classification was appropriate. In vacating the OHA’s ruling, the COFC noted that the predecessor Standard Industrial Classification Code (SIC)⁶³ for “Other Waste Removal” applied solely to refuse removal and not some of the other requirements of the solicitation.⁶⁴ The COFC remanded the case to the OHA for a new decision, but did not enjoin the award because the previous SIC codes used for similar work were not the predecessors to the NAICS “All Other Heavy Construction” classification.⁶⁵ The COFC also determined that it was unlikely that Ceres would have fallen under the average annual receipts threshold for any of the counterpart NAICS classifications the OHA could ultimately choose.⁶⁶

A dispute over a firm’s “small business” status may occur even when the parties agree on the applicable NAICS code.⁶⁷ In *CMS Information Services, Inc.*,⁶⁸ a Request for Quotations (RFQ) issued to small business Federal Supply Schedule (FSS) contractors required each vendor to “self-certify as small businesses as of the date of quotation submission.”⁶⁹ The protestor, CMS, was a small business at the time of its award on the FSS contract in 1997, but lost its small business status before sub-

mission of the RFQ in 2002. In its protest, CMS argued that the SBA’s regulations require that vendors certify as small businesses on the date of “initial offer submission” on the FSS RFQ.⁷⁰ The GAO rejected CMS’s contention, noting that the purpose of the RFQ requirement to self-certify was consistent with the Small Business Act’s goal “to ensure a fair proportion of all government contracts be placed with small business concerns.”⁷¹ The GAO disagreed with CMS’s narrow reading of the regulation, commenting that although the regulation provides for size status determination on the date the initial offer is submitted, “it does not go the next step and provide that small business status can be established *only* in connection with the submission of an offer (as opposed to quotation) or, conversely, that agencies are not permitted to consider small business status, as here, at the time of the submission of a quotation in response to an FSS.”⁷² The GAO also noted that this FSS contract had a “potential duration of twenty-one years,” a period of time during which several of the FSS vendors may lose small business status.⁷³

Successful, but “Nonresponsible” Awardee

In addition to reviewing NAICS and other small business size status contracting officer determinations, the SBA reviews a contracting officer’s determination that “an apparent successful small business offeror lacks certain elements of responsibility.”⁷⁴ If the SBA finds the contractor “responsible,” it issues a Certificate of Competency (COC), which states that the con-

61. 52 Fed. Cl. 23 (2002).

62. *Id.* at 26. The protestor met the “annual average receipts” small business threshold for “All Other Heavy Construction,” but not for “Other Waste Collection.” *Id.* at 37.

63. On 1 October 2000, the NAICS replaced the SIC as the basis for the SBA’s small business standards. See 65 Fed. Reg. 53,533 (Sept. 5, 2000) (amending 13 C.F.R. § 121.101).

64. *Ceres*, 52 Fed. Cl. at 35-37. The solicitation also required “the use of heavy equipment to cut debris, remove embedded material, place earth fill, shape embankments, and perform other construction-type related work.” *Id.* at 37.

65. *Id.* at 38-39.

66. *Id.* at 39.

67. Ironically, the applicability of a firm’s “undisputed” small business status is also subject to dispute. See, e.g., *Summit Research Corp.*, Comp. Gen. B-287523, July 12, 2001, 2001 CPD ¶ 176 (holding that an agency incorrectly limited a proposal’s “small business participation” clause to only the offeror’s proposed subcontractors, but not to the offeror itself, a small business).

68. B-290541, 2002 U.S. Comp. Gen. LEXIS 111 (Aug. 7, 2002).

69. *Id.* at *2.

70. *Id.* at *3 (citing 13 C.F.R. § 121.404 (2002)).

71. *Id.* (citing 15 U.S.C. § 644 (2000)).

72. *Id.* at *5 (emphasis added).

73. *Id.* at *5 n.2. The GAO will, “as a general rule, . . . defer to [the] SBA’s judgment in matters such as this, which fall squarely within its responsibility for administering the Small Business Act.” *Id.* at *3. In *Size Appeals of: SETA Corp., Fed. Emergency Mgmt. Admin.*, No. SIZ-4477, 2002 SBA LEXIS 10 (Mar. 1, 2002), the OHA ruled that an agency may properly determine size status under an FSS Multiple Award Schedule Contract (MAS) when it issues the solicitation for a blanket purchase agreement, not the MAS. The GAO found the concepts in *CMS* analogous to that in *SETA*. See *CMS*, 2002 U.S. Comp. Gen. LEXIS 111, at *7.

tractor is responsible “for the purpose of receiving and performing a specific Government contract.”⁷⁵ When the COC process extends past a contractor’s bid acceptance period, the contractor is wise to submit an extension or risk losing its chance to receive an award.

In *Brickwood Contractors, Inc.*,⁷⁶ a bidder’s noticeably low bid prompted the contracting officer to request that the bidder confirm its bid. The contracting officer also determined during a preliminary investigation that the bidder did not have the required “marine construction experience.”⁷⁷ After a few exchanges of correspondence, the contracting officer found the bidder “nonresponsible” and referred the matter to the SBA for consideration under the COC procedures. The contracting officer requested the bidder to extend its bid acceptance date, knowing that the SBA would not conduct a COC review if the review would not be completed past the current bid acceptance date.⁷⁸ The bidder failed to do so, and after the initial bid acceptance period passed, the contracting officer advised the bidder that its bid was no longer valid.⁷⁹ Rejecting the bidder’s contention that the contracting officer’s referral to the SBA was “untimely,” the GAO explained that no regulation requires a contracting officer to submit a referral to the SBA that guarantees a COC determination before the end of the bid acceptance period.⁸⁰

Contract Bundling

Bundling Brouhaha

Last year’s *Year in Review* reported on the concern over the effects of contract bundling on small businesses.⁸¹ Throughout the past year, Congress continued to propose legislation designed to limit the use of contract bundling. The fact that so many federal agencies have reviewed their actions in light of these concerns illustrates the breadth of those concerns.

On 17 January 2002, the Office of Small and Disadvantaged Business Utilization released a benefit analysis guidebook⁸² to assist DOD acquisition teams considering contract bundling. The guidebook directs the teams to perform the regulatory requirement of ascertaining “measurably substantial benefits,”⁸³ and offers “practical advice on avoiding bundling and on mitigating the adverse impact upon small business when the bundled action has been determined to be necessary and justified.”⁸⁴ The guidebook was released on the same day that DOD issued a memorandum reminding acquisition officials to “avoid unnecessary and unjustified bundling of requirements and take efforts to mitigate the negative impact that contract bundling has on small business concerns.”⁸⁵

74. See FAR, *supra* note 13, at 19.602-1. The elements of responsibility include, but are not limited to, “capability, competency, capacity, credit, integrity, perseverance, tenacity, and limitations on subcontracting.” *Id.*

75. *Id.* at 19.601(a).

76. Comp. Gen. B-290444, Jul. 3, 2002, 2002 CPD ¶ 121.

77. *Id.* at 2.

78. *Id.* at 3.

79. *Id.*

80. *Id.* at 6. The GAO was also unconvinced by the bidder’s assertion that it had actually faxed a request to extend the bid acceptance period in time, accepting the contracting officer’s explanation that the request was never received. *Id.* at 7-8. This case illustrates GAO’s deference to a contracting officer’s discretion in handling small business procurements. See also *Quality Trust, Inc.*, Comp. Gen. B-289445, Feb. 14, 2002, 2002 CPD ¶ 41 (denying a protest where the contracting officer refuses to review the protestor’s responsibility after the SBA declines to issue a COC and the protestor offers no new evidence). As mentioned earlier, deference extends to the SBA in “size” disputes with contractors. See FAR, *supra* note 13, at 19.602-1; accord *E.F. Felt Co., Inc.*, Comp. Gen. B-289295, Feb. 6, 2002, 2002 CPD ¶ 37 (dismissing a protest alleging bad faith on the part of the SBA for refusing to issue a COC).

81. See generally 2001 *Year in Review*, *supra* note 1, at 43.

82. This guidebook is available at <http://www.acq.osd.mil/sadbu>.

83. See FAR, *supra* note 13, at 7.107.

84. See *Contract Bundling: DOD Takes Aggressive Actions to Prevent Unnecessary Bundling, Mitigate Impact*, 77 BNA FED. CONT. REP. 9, at 241 (Mar. 5, 2002).

85. *Id.*

One senator praised the Air Force for its decision to set aside a multimillion-dollar C-20 aircraft maintenance and support contract for small business.⁸⁶ Last year's most notable contract bundling case, however, remains a thorny issue for more skeptical members of Congress.⁸⁷ Congress continues to scrutinize agencies' bundling practices as complaints from small businesses mount.⁸⁸ Dissatisfaction with federal agencies' approach to contract bundling has led to bills designed to close "loopholes that have allowed agencies to circumvent statutory safeguards intended to ensure that separate contracts are consolidated for sound economic reasons, and not merely for convenience."⁸⁹

Notwithstanding last year's *Phoenix* decision, the GAO continues to closely scrutinize single contracts previously divided among several vendors. In *TRS Research*,⁹⁰ the GAO held that a single-source procurement for leased intermodal container equipment and the management of an intermodal container leasing program was improperly bundled. Nine vendors, including the protestor, previously supplied the majority of containers through indefinite-delivery/indefinite-quantity contracts under a Master Lease Agreement (MLA).⁹¹ The agency

contended that the contract did not meet the definition of bundling because it was not "consolidating two or more procurement requirements for goods or services previously provided or performed under separate smaller contracts."⁹² Instead, the agency stated that the current requirement was a "single" requirement, and therefore not subject to statutory bundling restrictions.⁹³ The GAO disagreed, noting that the MLA functioned as a "list of a range of multiple procurement requirements" and that the "nine contracts awarded under the MLA were of varied scope and covered varying lists of equipment."⁹⁴ Consequently, the GAO sustained the protest and recommended that the SBA have an opportunity to propose alternative actions or to appeal the agency's consolidation of requirements.⁹⁵

HUBZone and SDBs: Can't We Just All Get Along?

Last year's *Year in Review* reported on changes in the HUBZone Program⁹⁶ which were designed to ease eligibility rules and clarify the program's scope.⁹⁷ The quest to end the confusion over any perceived priority between HUBZone businesses

86. See *Small Business: Air Force Reserves C-20 Aircraft Support Contract for Small Business*, 76 BNA FED. CONT. REP. 21, at 606 (Dec. 11, 2001). Senator Christopher "Kit" Bond (R-Mo.), ranking member of the Small Business and Entrepreneurship Committee, voiced a hope that the set aside "will serve as a practical example for other branches of the Armed Services." *Id.* The article also refers to a GAO report that outlines the impressive gains made by small business using the Internet. See GENERAL ACCOUNTING OFFICE, REPORT NO. 02-1, *Electronic Commerce: Small Business Participation in Selected On-Line Procurement Programs* (Oct. 29, 2001). Gains made by small businesses using the Internet are most likely to increase due to other projects that benefit small businesses. See Press Release, U.S. Small Business Administration, *businesslaw.gov* wins E-Gov Award, Announces Partnership With Cornell University (July 25, 2002) (on file with author) (discussing a website launched on 5 December 2001 that is designed to help small businesses comply with laws and regulations).

87. See *Phoenix Scientific Corp.*, Comp. Gen. B-286817, Feb. 24, 2001, 2001 CPD ¶ 24; see also *2001 Year in Review*, *supra* note 1, at 44-45 (discussing the reverberative effects of *Phoenix*).

88. See *Federal Contract "Watch List" Highlights Bundled Contracts That Freeze Out Small Businesses*, 44 GOV'T CONTRACTOR 17, ¶ 169 (May 1, 2002) (referring to a congressional report that targets ten huge contract bundling contracts because of the effect on small business); see also *Small Business: Small Businesses Criticize Impact of Contract Bundling, Streamlining on Bottom Lines*, 77 BNA FED. CONT. REP. 24 (June 18, 2002) (discussing a public meeting hosted by the Office of Federal Procurement Policy Administrator, Ms. Angela Styles, where the "consensus among most of the speakers was that obtaining contracts from the federal government in today's environment is extremely difficult and in many cases just plain 'unfair'"). *Id.*

89. See *Contract Bundling: Two Senate Bills Introduced to Tighten Contract Bundling Rules*, 77 BNA FED. CONT. REP. 19 (May 14, 2002) (referring to S. 2463, 107th Cong. (2002) and S. 2466, 107th Cong. (2002)). On 7 May 2002, S. 2463 was forwarded to the Senate Armed Services Committee, and on 8 October 2002, the Senate placed S. 2466 on its legislative calendar. The bills' statuses are available at <http://www.thomas.loc.gov>. The Senate has not been the only legislative body introducing bills that would limit contract bundling. See, e.g., H.R. 2867, 107th Cong. (2002). The bill, introduced by Representative Nydia Velazquez (D-NY), would require the SBA to appeal to the Office of Management and Budget when a federal agency rejects an SBA recommendation to alter the procurement strategy on a bundled contract. Furthermore, the bill would extend the amount of time for small businesses to respond to a solicitation for a bundled contract. *Id.*

90. Comp. Gen. B-290644, Sept. 13, 2002, 2002 CPD ¶ 159.

91. *Id.* at 2. In addition, three small businesses provided other items inadvertently omitted from the MLA. *Id.* at 3.

92. *Id.* at 3 (citing 15 U.S.C. § 632(o)(2)(3) (2000)). This contention seems contradictory to the agency's admission that "awarding a single contract . . . will cure performance problems experienced under the previous fragmented and inefficient approach." *Id.*

93. *Id.* at 4; see 13 C.F.R. § 125.2(d)(3)(iii)(A)(2) (2002) (requiring the greater of a cost savings of \$7.5 million or five percent of the total value of a contract equal to or greater than \$75 million).

94. *TRS*, 2002 CPD ¶ 159, at 5-6; see also *Vantex Serv. Corp.*, Comp. Gen. B-290415, Aug. 8, 2002, 2002 CPD ¶ 131 (holding that a contract bundling portable latrine services with fixed site waste removal unfairly restricted competition when the Army could not show significant cost savings).

95. *TRS*, 2002 CPD ¶ 159, at 9.

96. See 15 U.S.C. § 657(a) (2000); see also FAR, *supra* note 13, at 19.13. The HUBZone program was designed to increase employment opportunities by providing federal contracting assistance for qualified small business concerns located in historically under utilized business zones.

and SDBs continues. On 28 January 2002, the SBA issued a proposed rule to “clarify parity” between the two categories of businesses.⁹⁸ Specifically, a contracting officer should consider “where the contracting activity is in fulfilling its HUBZone and [section] 8(a) programs in determining how to fulfill a particular procurement requirement.”⁹⁹ The proposed rule also directs contracting officers to exercise their “discretion” when choos-

ing between the two programs.¹⁰⁰ The proposed rule has both strong proponents and opponents. Some believe “that Congress intended that the two programs be on equal footing.”¹⁰¹ Others see the move to parity as a “naked attempt to destroy the [section] 8(a) program.”¹⁰² Despite the need for clarity,¹⁰³ the proposed rule is not final. Major Modeszto.

97. See *2001 Year in Review*, *supra* note 1, at 45.

98. See 67 Fed. Reg. 3826 (Jan. 28, 2002) (amending 13 C.F.R. § 126.103 (2002)).

99. 67 Fed. Reg. at 3832.

100. *Id.*

101. See *HUBZone: SBA Proposed Rule Would Clarify Parity Between 8(a), HUBZone Programs*, 77 BNA FED. CONT. REP. 5 (Feb. 5, 2002) (sharing a sentiment held by the HUBZone Program’s author, Senator Christopher “Kit” Bond (R-Mo.) and others favorable to the HUBZone Program). In the article, Senator Bond explained his enthusiasm for the proposed change as follows: “Ensuring parity between HUBZones and [section] 8(a) will allow both programs to move forward from the controversy that has dogged them for the past two years.” *Id.*

102. *Id.* (quoting Rep. Nydia Velazquez (D-NY)). Hank Wilfong, the President of the National Association of Small Disadvantaged Businesses, shares Rep. Velazquez’s concern. Mr. Wilfong pointed out that an agency’s determination of whether it has met its HUBZone and section 8(a) goals is impossible to make because “while there is a statutory [three] percent goal for the HUBZone Program, there is no similar goal for the [section] 8(a) program.” *Id.*; see also 77 BNA FED. CONT. REP. 10, at 276 (Mar. 12, 2002) (discussing Senator John Kerry’s (D-Ma) concern that the proposed rule “will strike the wrong balance” between the two programs). *Id.*

103. See GENERAL ACCOUNTING OFFICE, REPORT NO. 02-57, *Small Business: HUBZone Program Suffers from Reporting and Implementation Difficulties* (2001) (reporting that HUBZone program achievements for fiscal year 2000 were significantly inaccurate). *Id.* at 1. One of the primary excuses federal contracting personnel offered for not achieving HUBZone participation goal—1.5 percent of the value of all prime contract awards—was the SBA’s guidance that emphasizes the section 8(a) program over the HUBZone program. *Id.* at 7-8. One point, however, is clear. If confusion exists about whether the solicitation calls for a HUBZone or another type of preference, a protestor needs to file its protest prior to bid opening because the source of the confusion will probably be considered a patent ambiguity. See, e.g., *J&H Reinforcing & Structural Steel Erectors, Inc. v. United States*, 50 Fed. Cl. 570 (2001).

Foreign Purchases

Black Beret Update

Last year's *Year in Review* issue reported on the congressional scrutiny of the Chief of Staff's decision to make the new black berets the Army's standard headgear by 14 June 2001, the Army's first birthday of the new millennium.¹ A General Accounting Office (GAO) report detailed the facts and circumstances leading to the decision to purchase the berets from several foreign suppliers.² Three of the contract actions were non-competitive procurements, justified based on the "unusual and compelling urgency" to meet the Chief of Staff's deadline.³ In addition, the Defense Logistics Agency (DLA) neglected to seek a Small and Disadvantaged Business Utilization Office review to determine the feasibility of small business participation.⁴

The DLA's use of a Berry Amendment waiver, which usually requires the Department of Defense (DOD) to purchase military clothing from domestic firms, also dismayed Congress.⁵ At the time the DLA invoked the Berry Amendment waiver provision, such waivers were possible if the "Secretary concerned or [his] *designee* determine[d] that [the items] can-

not be acquired when needed in a satisfactory quality and sufficient quantity grown or produced in the United States."⁶ The DLA approved waivers⁷ for all of the foreign companies, citing the 14 June 2001 deadline as the "emergency" justifying the waivers.⁸ On 2 May 2001, the Army announced at a hearing that it would not outfit any of its three million troops with berets from foreign sources, particularly from Chinese manufacturers contracting with the British Company Kangol, Ltd.⁹

On 11 December 2001, GAO filed a follow-up report "to assess the current status of the black beret procurement as well as the status of DOD's efforts to ensure proper waivers of the Berry Amendment."¹⁰ As of mid-October 2001, "2.1 million berets had been delivered to DLA, but less than 1 million [had] been distributed to Army, National Guard and Reserve personnel."¹¹ The reasons for the distribution delay were the cancellation of three contracts for failure to deliver the berets on time and the decision to not outfit any troops with Chinese-manufactured berets.¹² The report added, "DLA is in the process of contracting for additional berets so that it can distribute two berets to all personnel and have an adequate stock."¹³ The Army has come closer to this goal, having recently announced the award of a contract for the manufacture of berets.¹⁴ Even this decision, however, may cause certain members of Congress some angst.¹⁵

1. See Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 76-77.

2. See GEN. ACCOUNTING OFFICE, REPORT NO. GAO-01-695T, *Contract Management: Purchase of Army Black Berets* (May 2, 2001) [hereinafter GAO-01-695T]. After amending a contract with the current domestic supplier of berets, the Defense Logistics Agency (DLA) awarded contracts to two foreign suppliers and later made competitive awards to four additional foreign suppliers. The six foreign suppliers were from Canada, Romania, South Africa, Sri Lanka, India, and China. The Chinese supplier, Kangol, Ltd., was actually a United Kingdom contractor. Kangol's participation caused the most controversy in light of the prolonged standoff between the United States and China over a downed Navy surveillance plane. *Id.* app. I.

3. *Id.* (quoting David E. Cooper, Director, Acquisition and Sourcing Management).

4. *Id.* at 2 and app. I. One of the non-competitive awards was at a price fourteen percent higher than the domestic price. The price on the single largest noncompetitive contract was twenty-seven percent higher than the average competitive price. *Id.*

5. See 10 U.S.C. § 2533a (2000); see also U.S. DEP'T OF DEFENSE, DEFENSE FED. ACQUISITION REG. SUPP. 225.7002-1(a) (1 July 2002) [hereinafter DFARS].

6. See DFARS, *supra* note 5, at 225.7002-1(a) (emphasis added). On 1 May 2001, the Deputy Secretary of Defense cancelled the delegation of authority previously granted to the DLA Director and Senior Procurement Executive. As a result, only the Service Secretaries and the Under Secretary of Defense for Acquisition, Technology, and Logistics have Berry Amendment waiver authority. See Memorandum, Deputy Secretary of Defense, to the Under Secretary of Defense for Acquisition, Technology, and Logistics, and Secretaries of the Army, Navy and Air Force, subject: The Berry Amendment (1 May 2001) (on file with author). Consequently, the most recent version of the DFARS no longer includes the term "or designee." See DFARS, *supra* note 5, at 225.7002-1(b).

7. The Deputy Commander of the DLA's Defense Supply Center at Philadelphia, Pennsylvania, approved the first two waivers on 1 November 2000 and 7 December 2000. The DLA's Senior Procurement Executive approved a third waiver on 13 February 2001. See GAO-01-695T, *supra* note 2, at 3.

8. *Id.*; see generally *Buying the "Black Beret": Balancing Customer "Needs" and Socio-Economic Policies*, 43 GOV'T CONTRACTOR 15, ¶ 158 (Apr. 18, 2001) (opining that the emergency was more a by-product of an "arbitrarily selected" deadline rather than a true emergency).

9. See *Chinese Berets to Be Surplused as Army Bows to Political Pressure*, 43 GOV'T CONTRACTOR 18, ¶ 191 (May 9, 2001). The Chinese-made berets will be characterized as surplus property, a result described by one commentator as "replacing one symbolic gesture with another." *Id.*

10. GEN. ACCOUNTING OFFICE, REPORT NO. GAO-02-165, *Contract Management: Update on DOD's Purchase of Black Berets* 1 (2001) [hereinafter GAO-02-165] (quoting David E. Cooper, Director, Acquisition and Sourcing Management).

11. *Id.* at 3.

12. *Id.* The decision to stock the Chinese-manufactured berets as surplus affected "about 925,000 of the berets, valued at \$6.5 million." *Id.*

13. *Id.*

Because of the beret controversy, the DOD is exercising tighter controls on Berry Amendment waivers.¹⁶

DOD IG Has Its Say on Buy American Act & Berry Amendment Violations

After last year's beret saga, the GAO's recent report was a welcome sign that the DOD was making progress on monitoring its procurement practices relating to foreign purchases.¹⁷ Unfortunately, not all of the news during the past year was positive. On 20 March 2002, the DOD Inspector General (IG) issued a report evaluating the DOD's compliance with the Buy American Act (BAA)¹⁸ and the Berry Amendment¹⁹ during fiscal years 1998 and 1999.²⁰ The report discussed "698 of the procurements [of military clothing and related items], valued at \$136.7 million, by 65 installations."²¹ The report summarized violations as follows:

[DOD] contracting officers continued to violate the Buy American Act on FY 1998 and 1999 procurements of military clothing and related items. Of 698 contracts reviewed, 416 (60 percent) did not include the appropriate contract clause to implement the Buy American Act or the Berry Amendment. Contracting Officers at 13 military installations procured military clothing and related items that were manufactured or produced

abroad without determining whether items manufactured in the United States or a qualifying country were available, as required by the Buy American Act, or items manufactured in the United States were available, as required by the Berry Amendment. As a result, contracting officers awarded 28 contracts to contractors that supplied \$593,004 worth of items manufactured abroad that may have been available from contractors supplying items manufactured in the United States. The noncompliance with the Berry Amendment resulted in three potential violations of the Anti-Deficiency Act because the contracts were either funded directly with appropriated funds or working capital funds that were reimbursed with appropriated funds, which are not available for the procurement of foreign-made items.²²

DOD Proposes Rule to Negate Unfair Treatment of Certain U.S. Products

On 30 July 2002, the DOD issued a proposed rule²³ that would amend the Defense Federal Acquisition Regulation Supplement (DFARS) to avoid "treating products substantially transformed in the United States less favorably than products substantially transformed in a designated, Caribbean Basin, or

14. See *Cabot Company Wins Beret Contract from Army*, ASSOCIATED PRESS STATE & LOCAL WIRE, Sept. 25, 2002 (announcing the Army's award of a \$3.6 million contract to Bancroft Cap Company, a Cabot, Arkansas manufacturer).

15. See Duncan Adams, *Military Contract Up in the Air; Sen. George Allen Made Announcement Sept. 12 About Future Jobs in S.W. VA.*, ROANOKE TIMES & WORLD NEWS, Sept. 25, 2002, at A9. The article discusses the DLA's response to Virginia Senator George Allen's announcement that the contract award for military berets would go to a manufacturer in Southwest Virginia. A DLA spokesman characterized Senator Allen's announcement as "not correct." *Id.*

16. The GAO commented that "[b]ecause DOD is taking actions to ensure proper waivers of the Berry Amendment, we are not making any recommendations." See GAO-01-165, *supra* note 10, at 1. In addition to the limitations on Berry Amendment waivers, the DLA sent additional guidance to its buying activities to "heighten supplier awareness of the requirements of the Berry Amendment and thus facilitate compliance with the Amendment." *Id.* at 7.

17. See generally *id.*

18. See 41 U.S.C. § 10a (2000).

19. See 10 U.S.C. § 2533a (2000).

20. U.S. DEP'T OF DEFENSE, INSPECTOR GEN., REP. NO. D-2002-066, *Buy American Act Issues on Procurements of Military Clothing* (Mar. 20, 2002) [hereinafter DOD IG REPORT 02-066], available at <http://www.dodig.osd.mil/audit/reports/fy02/02-066.pdf>.

21. *Id.* at i.

22. *Id.* The DOD General Counsel declined to treat twenty-five BAA violations relating to procurements of commercial items as potential ADA violations because of ambiguities in the DFARS. Accordingly, the DOD General Counsel issued a prospective opinion that states that the BAA applies to procurements of commercial items. Memorandum, Office of the General Counsel, Dep't of Defense, to Deputy Assistant Inspector General for Auditing, Office of the Inspector General, subject: Request for Opinion Whether Certain Expenditures in Violation of the Buy American Act (41 U.S.C. § 10a-d) Also Violate the Antideficiency Act (31 U.S.C. § 1341) (18 Jan. 2002) (on file with author). One month before, the Army, perhaps anticipating the report's conclusions, had distributed a memorandum directing procurement officials to increase emphasis on BAA and Berry Amendment compliance. See Memorandum, Office of the Assistant Secretary of the Army, Acquisition, Technology, and Logistics, to Principal Assistants Responsible for Contracting, subject: Buy American Act and Berry Amendment Restrictions on the Procurement of Military Clothing and Related Items (14 Feb. 2002) (on file with author).

23. Defense Federal Acquisition Regulation Supplement; Trade Agreements Act—Exception for U.S. Made End Products, 67 Fed. Reg. 49,278 (proposed July 30, 2002) (to be codified at 48 C.F.R. pts. 225, 252).

North American Free Trade Agreement country.”²⁴ Existing DFARS policy places a fifty percent price evaluation preference for domestic end products over U.S.-made end products that do not qualify as domestic end products.²⁵ For acquisitions subject to the Trade Agreements Act (TAA),²⁶ however, an end product of a designated Caribbean Basin country²⁷ or North American Free Trade Act (NAFTA) country²⁸ is exempt from application of the fifty percent evaluation factor, regardless of the source of the product’s components. The proposed change

would eliminate the fifty percent price evaluation that the DOD gives to domestic end products subject to the TAA over U.S.-made end products with a foreign component content of fifty percent or greater. The goal is to provide a disincentive for companies that provide domestic end products containing foreign components to move their facilities to designated Caribbean Basin or NAFTA countries. Comments on the proposed rule were due on 30 September 2002. Major Modeszto.

24. *Id.* at 49,279; *see also Buy American Act: DOD Violates BAA, Berry Amendment On Clothing Procurements, IG Finds*, 78 BNA FED. CONT. REP. 6, at 403 (Aug. 6, 2002).

25. *See* DFARS, *supra* note 5, at 252.225. The DFARS defines a domestic end product as:

- i. An unmanufactured end product that has been mined or produced in the United States; or
- ii. An end product manufactured in the United States if the cost of its qualifying country components and its components that are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all of its components.

Id. at 252.225-7001(a)(2)(i) and (ii).

26. 19 U.S.C. §§ 2501-2582 (2000).

27. *See* DFARS, *supra* note 5, at 252.225-7007(a)(1).

28. *Id.* at 252.225-7007(a)(4).

Randolph-Sheppard Act

RSA¹ Continues to Score Knockouts in Food Fights

Last year's *Contract Law Year in Review*² reported on *NISH v. Cohen*,³ a case from the U.S. Court of Appeals for the Fourth Circuit that affirmed a district court holding that the preference for blind vendors in the Randolph-Sheppard Act (RSA) applies to the procurement of dining facility services.⁴ On 15 February 2002, "in a case with virtually identical facts to [*NISH v. Cohen*]," the United States District Court for the District of New Mexico held that the Air Force properly applied the blind vendor priority of the RSA to a contract for operation of a mess hall.⁵

In *NISH v. Rumsfeld*, RCI, Inc. was the Javits-Wagner-O'Day Act (JWOD)⁶ mandatory source contractor for ten years before the award to the New Mexico Commission for the Blind (NMCB). RCI argued that the RSA did not apply to military mess halls "because vending as envisioned by the RSA is limited to an entirely private transaction and, in obtaining full food services for mess halls, the DOD is expending appropriated funds."⁷ The court disagreed with RCI's view that the expenditure of appropriated funds was dispositive. Instead, it took a

broader view, reasoning that the federal government engages in a "procurement" as defined in the Competition in Contracting Act (CICA)⁸ "[w]hen the federal government determines that there is a need for services for its employees or the public and thus contracts with a vendor to come onto federal property."⁹ The court also deferred to the Department of Education's interpretation that the RSA applies to contracts for military mess halls because the RSA itself is silent on the issue.¹⁰ Finally, the court found the Fourth Circuit's reasoning "persuasive" on the issue of the conflict between JWOD and the RSA.¹¹ Given that the facts, rationale, and holdings of *NISH v. Cohen* and *NISH v. Rumsfeld* were strikingly similar, RSA and JWOD proponents may have fought the last round of their food fights.¹²

Only "Competitive" State Licensing Agencies Need Apply

In *North Carolina Division of Services for the Blind (NCDSB) v. United States*,¹³ the government issued a solicitation to provide full food and dining facility attendant services at Fort Bragg, North Carolina. The solicitation, which included a "detailed description of the evaluation factors to contract award," stated that the "Army will award the contract to the offeror who represents the best value."¹⁴ The solicitation was

1. The Randolph-Sheppard Act, 20 U.S.C. § 107(a)-(f) (2000), is designed to maximize the number of vending facilities on federal property that are operated by the blind. The original Act was limited in scope and extended a priority to contracts in federal buildings for newsstands, snack bars, and similar establishments. In 1974, Congress extended the definition of vending facilities subject to the Act to include cafeterias. Act of Dec. 7, 1974, Pub. L. No. 93-516, 88 Stat. 1617.

2. Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 123 [hereinafter *2001 Year in Review*].

3. 247 F.3d 197 (4th Cir. 2001). Although NISH appears to be an acronym, the full name of this organization is The Committee for Purchase from People Who Are Blind or Severely Disabled. NISH Web Site, *NISH Contacts* (Nov. 21, 2002), at http://www.jwod.gov/jwod/contacts/nish_contacts.htm.

4. *Cohen*, 247 F.3d at 204; see also *2001 Year in Review*, *supra* note 2, at 123.

5. *NISH v. Rumsfeld*, 188 F. Supp. 2d 1321, 1326 n.7 (D.N.M. 2002).

6. The Javits-Wagner-O'Day Act (JWOD), 41 U.S.C. §§ 46-48c (2000), authorizes an independent federal agency, the Committee for Purchase From People Who Are Blind and Severely Disabled, to identify products and services for federal procurement that persons with disabilities can provide. This committee had designated the NISH as the central nonprofit agency facilitating procurement from qualified agencies. *Cohen*, 247 F.3d at 200.

7. *Rumsfeld*, 188 F. Supp. 2d at 1326. All the parties "appear to concede that if the RSA does not apply to contracts for military mess hall services, the JWOD would require the Kirtland [Air Force Base] to contract with RCI for full food services at the mess hall." *Id.* at 1324.

8. Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 98 Stat. 1175 (codified as amended in scattered sections of 10 U.S.C., 31 U.S.C., and 41 U.S.C.).

9. *Rumsfeld*, 188 F. Supp. 2d at 1324.

10. *Id.* at 1328.

11. *Id.* at 1329 (referring to the Fourth Circuit's remark that the "basic tenant of statutory construction [is] that when two statutes ostensibly apply, the more specific of the two control[s]").

12. During the writing of this article, the Comptroller General decided a case that underscored the general view that the RSA preference does not conflict with other required sources procurements. In *Intermark, Inc.*, B-290925, 2002 U.S. Comp. Gen. LEXIS 167 (Oct. 23, 2002), the General Accounting Office (GAO) held that an agency improperly withdrew a small business set-aside procurement on the basis that the RSA State Licensing Agency (SLA) for the State of Alabama was not a small business. Therefore, the agency believed that it needed to open the solicitation competition to all businesses. The GAO disagreed, stating that the solicitation could offer a "cascading" set of priorities. That is, the SLA will receive the award if it falls within the competitive range and consultation with the Secretary of Education agrees the award should be made to the SLA. If both of these conditions are unmet, then the competition is limited to the eligible small businesses. *Id.* at *6-7.

13. 53 Fed. Cl. 147 (2002).

issued as a small business set-aside, rather than pursuant to the RSA.¹⁵ After evaluating the bids, the contracting officer informed the state licensing agency, NCDSB, that it was outside of the competitive range and that its proposal “did not have a reasonable chance of being selected for award.”¹⁶

The Court of Federal Claims (COFC) first settled the issue of the standing of Mr. Timothy M. Jones, one of the plaintiffs who would take over the contract and receive its benefits. The COFC determined that Mr. Jones, as the blind licensee, “would be the contract manager, one of the people identified by NCDSB ‘in positions of importance in the contract,’ but certainly *not a bidder or offeror*.”¹⁷ Therefore, Mr. Jones did not fit the CICA’s definition of the term “interested party.”¹⁸

The court came to a similar conclusion in response to the contention that NCDSB would have a reasonable chance to receive the award if Fort Bragg had properly applied the RSA at the beginning of the solicitation. Specifically, the COFC held that the NCDSB lacked standing because it “cannot show that it would have been in a position to receive the challenged award since it was not in the competitive range as required to apply the RSA priority.”¹⁹ In addition to the standing issues, the COFC concluded that the challenge to the solicitation itself was untimely.²⁰ Finally, the COFC rejected the argument that “RSA regulations require the application of a competitive range definition that is different from that typically used in federal procurement.”²¹ Major Modeszto.

14. *Id.* at 152.

15. *Id.* at 154. To support its conclusion that the solicitation did not qualify under the RSA, the court mentions a memorandum by the Fort Bragg Contracting Office, which was submitted to the Army through its higher headquarters at Forces Command. The memorandum reported that the solicitation did not qualify under the RSA. *Id.* The COFC, however, did not mention the specific contents of the memorandum because the “court’s ruling . . . does not rely upon such opinions in any manner.” *Id.* at 154 n.8.

16. *Id.* at 153.

17. *Id.* at 162 (emphasis added).

18. *See* Competition in Contracting Act, Pub. L. No. 98-369, § 2741(a), 98 Stat. 1175, 1199 (codified as amended at 31 U.S.C. 3551) (defining the term “interested party” as “an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract”).

19. *NCDSB*, 53 Fed. Cl. at 162. The RSA authorizes the Department of Education to “[prescribe] regulations designed to accomplish the purposes of the statute.” 20 U.S.C. § 107(b)(2) (2000). The regulations are promulgated at 34 C.F.R. § 395.1-.38 and state, in pertinent part,

If the proposal received from the State licensing agency is judged to be within the competitive range and has been ranked among those proposals which have a reasonable chance of being selected for final award, the property managing department, agency, or instrumentality shall consult with the Secretary as required under paragraph (a) of this section.

34 C.F.R. § 395.33 (2002).

20. *NCDSB*, 53 Fed. Cl. at 165 (“adopt[ing] the General Accounting Office rule that protests based upon alleged improprieties in a solicitation which are apparent prior to bid opening or the time of receipt of proposals” are untimely).

21. *Id.* at 167.

Labor Standards

The President's Proprietary Authority

In *Building Construction Trades Department, AFL-CIO v. Allbaugh*,¹ the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals) reversed the United States District Court for the District of Columbia (District Court) and held that President Bush acted within his constitutional authority when he issued an Executive Order² (EO) that prohibited the required use of project labor agreements³ (PLA) on any federal or federally funded construction projects.⁴

On 17 February 2001, President Bush signed EO 13,202. The EO prevents contracting authorities from requiring or forbidding the use of PLAs.⁵ The plaintiffs⁶ challenged the validity of the EO after the Federal Highway Administration rejected a bid specification that incorporated a PLA for a federally funded construction project.⁷ The District Court held that the

President exceeded his authority by issuing the EO.⁸ The court also found that the National Labor Relations Act⁹ (NLRA) preempted the President's authority because the EO "abridged the rights granted in the Act and would alter the delicate balance of bargaining and economic power that the NLRA establishes."¹⁰ The District Court issued a permanent injunction against enforcement of the Executive Order; the agency appealed this injunction.¹¹

On appeal, the Court of Appeals reversed and vacated the District Court's injunction. The Court of Appeals held that "the President's power necessarily encompasses general administrative control of those executing the laws," which "frequently requires the President to provide guidance and supervision to his subordinates."¹² The court determined that the EO was "such an exercise of the President's supervisory authority over the Executive Branch."¹³

1. 295 F.3d 28 (2002).

2. Exec. Order No. 13,202, 66 Fed. Reg. 11,225 (Feb. 22, 2001).

3. A PLA is

[a] multi-employer, multi-union prehire agreement designed to systemize labor relations at a construction site. It typically requires that all contractors and subcontractors who will work on a project subscribe to the agreement; that all contractors and subcontractors agree in advance to abide by a master collective bargaining agreement for all work on the project, and that wages, hours, and other terms of employment be coordinated or standardized pursuant to the PLA across the many different unions and companies working on the project.

Bldg. Constr., 295 F.3d at 30.

4. *Id.* at 36. The EO applies to "any executive agency issuing grants, providing financial assistance, or entering into cooperative agreements for construction projects." *Id.*

5. *Id.* at 30.

6. The plaintiffs were the Building and Construction Trades Department of the AFL-CIO (BCTD), the Building Construction Trades Council (BCTC), and the City of Richmond, California. The BCTD consists of fourteen national labor organizations. The BCTC consists of twenty-seven local labor unions representing construction workers in Contra Costa County, California. The BCTD alleged that the EO inhibited the enforcement of the PLA in the Woodrow Wilson Bridge Construction Project and future contracts. The BCTC claimed that the EO inhibited its ability to negotiate PLAs on future federally funded City of Richmond projects. The City of Richmond alleged that the EO inhibited its ability to require PLAs on federally funded construction projects without losing access to federal funds. *Id.* at 30-31.

7. *Id.* ("The plaintiffs negotiated a PLA for the Woodrow Wilson Bridge Construction Project. Congress appropriated \$1.5 billion for the project and transferred ownership of the bridge to the District of Columbia, the State of Maryland, and the Commonwealth of Virginia."). Although this arrangement transferred ownership and control of the project to state agencies, it required them to submit bid specifications to the Federal Highway Administration for approval. *Id.*; 23 C.F.R. §§ 630.205(e), 635.104(a), 635.112(a) (2002).

8. *Bldg. Constr.*, 295 F.3d at 31. The district court held that the "President could not impose the conditions of the EO upon the administration of federal funds without the express authorization of the Congress and that no other statutes authorized the President's action." *Id.*

9. 29 U.S.C. §§ 151-159 (2000).

10. *Id.* In its opinion below, the District Court explained as follows:

The PLA is a form of a prehire collective bargaining agreement [which is] usually negotiated before the start of a construction project. Section 8(f) of the NLRA, 29 U.S.C. § 158(f), authorizes the use of prehire agreements in the construction industry. Section 8(e) of the NLRA, 29 U.S.C. § 158(e), authorizes prehire agreements to require all contractors and subcontractors performing work on a particular construction project to be bound by the terms of a prehire agreement covering the project. Taken together, [Sections] 8(e) and (f) of the NLRA authorize the use of a PLA on a construction project, pursuant to which all contractors and subcontractors operating on the project must agree to adhere to the PLA's terms.

Bldg. & Constr. Trades Dep't, AFL-CIO v. Allbaugh, 172 F. Supp. 2d 67, 77 (D.D.C. 2001).

The district court held that because “private entities were being prohibited . . . from requiring PLAs that are expressly allowed by the [NLRA], the NLRA preempted the EO insofar as it applies to private recipients of federal funding who act as employers in construction projects.”¹⁴ The appeals court held, however, that the NLRA was not applicable unless the “[g]overnment is regulating within a protected zone, not when it is acting as a proprietor.”¹⁵ If the government imposes a condition to awarding or funding a contract unrelated to the employer’s performance of contractual obligations to the government, the condition is regulatory. Because “the impact of [the] procurement policy [expressed in EO 13,202] extends only to work on projects funded by the government,” the EO expresses a proprietary policy that is not subject to preemption by the NLRA.¹⁶

Labor Clauses Below the Simplified Acquisition Threshold

On 20 March 2002, the Civilian Agency Acquisition Council (CAAC) and the Defense Acquisition Regulations Council

(DARC) issued a final rule, amending the Federal Acquisition Regulation (FAR) and clarifying the application of labor clauses to contracts below the simplified acquisition threshold.¹⁷ The final rule incorporates the prohibition of segregated facilities clause and the equal opportunity clause by reference.¹⁸ The rule also requires the application of the prohibition of segregated facilities clause whenever the equal opportunity clause is used.¹⁹ The rule clarifies the geographic application of the Walsh-Healey Public Contracts Act,²⁰ the Affirmative Action for Workers with Disabilities Act,²¹ and the Service Contract Act.²² Finally, the rule defines “United States” in the equal opportunity clause.²³

Davis-Bacon Act

What Do You Mean I’m Responsible?

In *Westchester Fire Insurance Co. v. United States*,²⁴ the U.S. Court of Federal Claims (COFC) held that the rights of a subcontractor’s employees to withheld Davis-Bacon Act²⁵ (DBA)

11. Specifically, the District Court held:

[T]he President could not impose the conditions of the Executive Order upon the administration of federal funds without the express authorization of the Congress. . . . [N]either the Federal Property and Administrative Services Act nor any other statute authorized the President to issue the EO. . . . The EO was preempted in its entirety by the National Labor Relations Act because the EO would abridge rights granted in [Section] 8 of the Act.

Id.

12. *Bldg. Constr.*, 295 F.3d at 32.

13. *Id.* at 33.

14. *Id.* at 34.

15. *Id.* The appeals court determined that the government is the proprietor of its own funds, and that it is acting in a proprietary capacity when it acts to ensure the most effective use of those funds. The court also held that the distinction between federally owned and federally funded was not relevant here because the government, like a private entity, is concerned with the efficient use of its financial backing whether it is a lender to, a benefactor of, or the owner of a project. *Id.* at 35.

16. *Id.* at 36.

17. Application of Labor Clauses, 67 Fed. Reg. 13,066 (Mar. 20, 2002) (to be codified at 48 C.F.R. pt. 52); *see* GENERAL SERVS. ADMIN. ET AL., FEDERAL ACQUISITION REG. (July 2002) [hereinafter FAR].

18. FAR, *supra* note 17, at 52.222-221. This section prohibits segregated facilities, defines the term “segregated facilities,” and requires contractors to agree that “it does and will not maintain or provide for its employees any segregated facilities at any of its establishments and that the contractor does not and will not permit its employees to perform their services at any location under its control where segregated facilities are maintained.” *Id.*

19. 67 Fed. Reg. at 13,066.

20. 41 U.S.C. §§ 35-45 (2000). The Walsh-Healey Public Contracts Act applies to supply contracts over \$10,000 in the United States, Puerto Rico, or the U.S. Virgin Islands. 67 Fed. Reg. at 13,067.

21. 29 U.S.C. § 793 (2000). The Affirmative Action for Workers with Disabilities Act applies to contracts over \$10,000, unless the work will be performed outside the United States by employees recruited outside the United States. “United States” means the fifty states, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island. 67 Fed. Reg. at 13,067.

22. 41 U.S.C. § 351. The Service Contract Act applies to service contracts over \$2500 performed in the United States, District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, or the outer continental shelf lands. 67 Fed. Reg. at 13,067.

23. FAR, *supra* note 17, at 52.222-226. The Equal Opportunity clause defines “United States” as the fifty states and the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, and Wake Island. 67 Fed. Reg. at 13,067.

and Contract Work Hours and Safety Standards Act²⁶ (CWHSSA) wages were superior to the rights of the Coast Guard, the contractor, and the contractor's subrogee, Westchester.²⁷ Zanis Contracting Corporation (Zanis) was the prime contractor for a \$440,000 U.S. Coast Guard contract for waterfront rehabilitation at a Coast Guard facility in Eaton Neck, New York. The contracting officer terminated the Eaton Neck contract for default and re-procured the remaining work after the contracting officer and the surety failed to enter into a takeover agreement.²⁸ Five months after the contracting officer terminated the contract, the Department of Labor (DOL) requested that the contracting officer withhold \$69,105.12 for alleged DBA and CWHSSA wage infractions by a Zanis subcontractor, Harbor Clean Corporation (Harbor Clean). Westchester claimed that the contracting officer voluntarily paid the GAO \$60,216.58 of the unpaid balance of the defaulted Zanis contract for DBA and CWHSSA violations. Therefore, Westchester argued that their liability excluded the amount the contracting officer paid to the GAO.²⁹

The COFC held that the contracting officer was required to withhold funds from the prime contractor by law and by contract, and therefore, that the release of the funds to the GAO was not voluntary.³⁰ Once withheld, the funds were no longer avail-

able to the Coast Guard, Zanis, or Westchester because "a surety is not entitled to the use of contract funds that are set aside to pay."³¹ Westchester claimed subrogation to the rights of the Coast Guard. The COFC responded that "it was immaterial whether Westchester was subrogated to the rights of the Coast Guard or Zanis in the remaining balance of the contract because the rights of the harbor workers were superior to both."³² The court also held that Harbor Clean violated the labor standards during the performance of the contract.³³ After Zanis defaulted, Westchester was responsible for fulfilling the terms of the contract under the performance bond or the payment bond.³⁴ The GAO recommended that Westchester pay \$151,449.58, plus interest.³⁵

Service Contract Act

Agency Responsible for Wages Paid Pursuant to Law

In *Instrument Control Service Inc.*,³⁶ the incumbent contractor, Instrument Control Service (ICS), alleged that the request for proposals (RFP) was defective because the solicitation excluded any wage conformance for employees who were omitted from the wage determination under the previous con-

24. 52 Fed. Cl. 567, 582 (2002).

25. 40 U.S.C. §§ 276a(a)(7) (2000).

26. *Id.* §§ 327-333.

27. *Westchester*, 52 Fed. Cl. at 581.

28. *Id.* Westchester claimed that the government owed it the entire remaining balance (\$203,651) under the Zanis contract. The contracting officer agreed, except for \$69,105.12 that the Department of Labor requested withheld pending completion of an investigation of Harbor Clean, a Zanis subcontractor, for alleged violations of the DBA and the CWHSSA. *Id.* at 581.

29. *Id.* at 580. Harbor Clean employees received restitution in the amount of \$60,216.58 in back wages and fringe benefits, pursuant to an agreement between the DOL and Harbor Clean—\$8888.54 less than the contracting officer was originally requested to withhold. "[T]he Comptroller General (GAO) is authorized and directed to pay directly to [workers] from any accrued payments withheld under the terms of the contract any wages found to be due . . . 40 U.S.C. § 276a-2(a)." *Id.*; see also 40 U.S.C. § 276a-2(a).

30. *Westchester*, 52 Fed. Cl. at 581. The Eaton Neck contract incorporated the Davis-Bacon Act and the FAR section 52.222-7 Withholding of Funds clause, requiring the contracting officer to withhold funds under the contract if violations under the DBA were suspected or if a representative of the DOL requested the contracting officer to withhold funds. *Id.* at 580.

31. *Id.* at 583 (citing *Reliance Insur. Co. v. United States*, 27 Fed. Cl. 815, 828 (1993)).

32. *Id.* at 582.

33. *Id.* Westchester tried "to make an issue of the fact that DOL ordered the contracting officer to withhold the funds five months after the contract had been terminated for default rather than during Zanis's performance of the contract." *Id.* The court held that this was a "distinction without legal significance" because "the violations were committed by a Zanis subcontractor during the performance of the contract . . . so the funds were owed to the subcontractor's workers prior to the contractor's default." *Id.*

34. *Id.* Even if Westchester entered into a takeover agreement with the Coast Guard, the withheld funds would not have been available under the contract. When Zanis defaulted and Westchester did not enter into a takeover agreement, Westchester was responsible under the payment bond. *Id.*

35. *Id.* at 568-69. The total included \$90,229.00 to re-procure the contract, plus \$60,216.58 paid to the DOL under the agreement between the DOL and Harbor Clean. *Id.*

36. Comp. Gen. B-289660, B-289660.2, Apr. 15, 2002, 2002 CPD ¶ 66. The Air Force issued an RFP "for calibration and repair services of test, measurement and diagnostic equipment at the Precision Measurement Equipment Laboratory, Warner Robbins Air Logistics Center, Robins Air Force Base, Georgia." *Id.* at 1.

tract.³⁷ The RFP incorporated the requirements regarding “wages for any class of employees subject to the Service Contract Act,³⁸ but omitted from the wage determination.”³⁹ ICS knew about the prior contract’s wage conformances but argued that it was under a competitive disadvantage because “prospective offerors may underestimate the cost of the excluded employees and underbid [ICS] because of their lack of knowledge.”⁴⁰

The GAO denied ICS’s protest. First, the GAO held that the FAR does not require agencies to include wage conformances in the solicitation; a successor contractor is not bound by the previous contract’s wage conformance.⁴¹ Second, the GAO reviewed the solicitation to determine whether it provided the offerors sufficient detail to compete intelligently and on an equal basis.⁴² The GAO reasoned that the Air Force treated the offerors equally because they could obtain the wage conformance information pursuant to a Freedom of Information Act (FOIA) request.⁴³ The Comptroller General noted that including the wage conformance in the solicitation could increase competition but acknowledged “the absence of a statutory or regulatory obligation to do so.”⁴⁴

In *Phoenix Management, Inc.*,⁴⁵ the Armed Services Board of Contract Appeals (ASBCA) sustained a contractor’s claim

for increased labor costs pursuant to a DOL wage determination.⁴⁶ The Air Force awarded Phoenix a contract for airfield management services at Randolph Air Force Base, Texas, in February 1997. The contract included a seven-month base period and four one-year option periods. At the time of the award, the contract excluded a wage determination for the airfield manager (AM) and assistant airfield manager (AAM).⁴⁷

Phoenix entered into a collective bargaining agreement (CBA) with the union in January 1999. The CBA included the AM and the AAM. Phoenix notified the contracting officer, but did not seek a conformance.⁴⁸ The contracting officer forwarded the CBA to the DOL and objected to the inclusion of the AM and the AAM.⁴⁹ The DOL issued a wage determination incorporating the CBA, and the contracting officer did not request further review. The contracting officer exercised the option for fiscal years (FY) 2000 and 2001, and the extended performance incorporated the DOL wage determination. Phoenix protested the contracting officer’s denial of the FY 2000 and FY 2001 wage increases for the AM and AAM.⁵⁰

The board concluded that Phoenix was entitled to recover the cost increases for FY 2000 and 2001.⁵¹ The board found that the Fair Labor Standards Act⁵² and Service Contract Act⁵³ required a price adjustment for increased wages for the option

37. *Id.* at 1. ICS protested before the RFP’s closing date. ICS also alleged that a five working day turnaround requirement was unnecessary and unattainable. The GAO held that ICS failed to establish that the requirement did not represent the Air Force’s minimum needs. *Id.*

38. 41 U.S.C. §§ 351-388 (2000).

39. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 3; see FAR, *supra* note 17, at 52.222-42(c)(2)(i) (requiring contractors to classify employees, employed under the contract but not listed in the wage determination, with employees who have a reasonable relationship to employees classified in the wage determination).

40. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 3; see FAR, *supra* note 17, at 52.222-42(c)(2)(ii). This section requires the contractor to initiate the conformance procedure by submitting the SF 1444, *Request for Authorization of Additional Classification and Rate*, to the contracting officer within thirty days from the date the unlisted employees perform any work on the contract. The contracting officer reviews the form, makes recommendations, and submits it to the DOL’s Wage and Hour Division (WHD). The WHD will respond or notify the contracting officer that additional time is required within thirty days of receipt of the request. *Id.*

41. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 4. ICS could “elect without DOL approval, to adopt . . . a previous wage conformance instead of initiating a new wage conformance action[, but] is not entitled to a price adjustment as part of a wage conformance action if the conformed wage is higher than the wage estimated when submitting its proposal.” *Id.* at 3.

42. *Id.* at 4; accord *Braswell Servs. Group, Inc.*, Comp. Gen. B-276694, July 15, 1997, 97-2 CPD ¶ 18, at 2 (holding that the agency solicitation must provide sufficient detail to enable offerors to compete intelligently and on an equal basis).

43. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 4. The solicitation informed offerors the wage conformance “information could be obtained pursuant to the Freedom of Information Act (FOIA).” *Id.*; see 5 U.S.C. § 552 (2000).

44. *Instrument Control Serv.*, 2002 CPD ¶ 66, at 5. The GAO failed to understand why the Air Force did not make the previous wage conformance “more freely available” when the offerors could obtain the information under FOIA. *Id.*

45. ASBCA No. 53409, 02-1 BCA ¶ 31,704.

46. *Id.* at 156,591.

47. *Id.* at 156,587.

48. *Id.* at 156,588. Phoenix did not submit the SF-1444, *Request for Authorization of Additional Classification and Rate*, to the contracting officer. *Id.*

49. *Id.* at 156,587. The CO did not submit the SF 1444 to seek a conformance. *Id.*

50. *Id.* at 156,588.

renewal pursuant to the DOL wage determination.⁵⁴ The ASBCA rejected the Air Force's argument that the FY 2000 option year "resulted in an initial conformance for the AM and AAM positions."⁵⁵ The board refused to treat the wage determination as a conformance because Phoenix and the Air Force

failed to comply with the conformance process and because the DOL wage determination failed to convey that the DOL "intended it to be a conformance."⁵⁶ Phoenix was therefore entitled to recover wages associated with the cost of complying with the wage determination.⁵⁷ Major Davis.

51. *Id.* at 156,590–91.

52. 29 U.S.C. §§ 201-219 (2000).

53. 41 U.S.C. §§ 351-358 (2000).

54. *Phoenix Mgmt.*, 02-1 BCA ¶ 31,704, at 156,589.

55. *Id.* at 156,590.

56. *Id.*

57. *Id.* at 156,591; *accord* Glazer Constr. v. United States, 52 Fed. Cl. 513 (2002) (holding that a DBA violation discovered after contract termination was a justifiable basis for termination of the contract, even though the DBA violations were not known at the time of the termination).

Bid Protests

Jurisdiction

No Implied Contract Jurisdiction at COFC

Last year's *Year in Review* discussed how the Administrative Dispute Resolution Act of 1996¹ (ADRA) ended district courts' bid protest jurisdiction on 1 January 2001.² The Court of Appeals for the Federal Circuit (CAFC) has since held that the ADRA requires courts to review an agency award decision under the standards set forth in the Administrative Procedure Act (APA).³ From the perspective of protestors, the result was a more favorable standard of review on the issue of contractor "responsibility." The standard, which previously required a showing of fraud or bad faith, now requires a mere showing of a lack of rational basis or a violation of a regulation or procedure.⁴

In *Lion Raisins, Inc. v. United States*,⁵ the Court of Federal Claims (COFC) applied this new reasoning when a protestor sought lost profits under an implied contract theory. The COFC had previously granted the protestor's summary judgment motion, holding that the United States Department of Agriculture's (USDA) decision to suspend the plaintiff, and thereby preclude it from bidding, was arbitrary, capricious, an abuse of discretion, and not in accordance with the law.⁶ The protestor sued for lost profits, arguing that the ADRA did not relinquish

the court's bid protest jurisdiction under the implied-contract theory.⁷ The COFC disagreed, noting that the ADRA repealed the provision in the Tucker Act that previously granted bid protest jurisdiction under the implied-contract theory.⁸ The provision was also replaced by another provision that limited monetary relief to "bid preparation and proposal costs."⁹ The limit is identical to that imposed on district courts' bid protest jurisdiction exercised before the ADRA. The court's decision "establishe[s] that Congress expressly intended the ADRA to confer the Court of Federal Claims with the same power in bid protest actions that the district courts exercised under the APA."¹⁰

Not All Reviews Are the Same

The ADRA grants the COFC authority under the Tucker Act to review "any alleged violation of statute or regulation in connection with a procurement or a proposed procurement."¹¹ As *Advance Construction Services, Inc. v. United States (Advance Construction)*¹² illustrates, that authority is limited to a review of the agency's actions, not the GAO's decision. The plaintiff in *Advance Construction*, the awardee on a road upgrade contract, requested declaratory and injunctive relief on the eve of a GAO bid protest hearing initiated by the losing bidder. The plaintiff contended that the GAO violated several statutes and regulations governing GAO bid protests.¹³ The COFC rejected the plaintiff's argument that the Tucker Act contemplated a review of GAO violations.¹⁴ Citing the pertinent legislative his-

1. Pub. L. No. 104-320, 110 Stat. 3870 (1996) (amending 28 U.S.C. § 1491 (2000)).

2. See Major John J. Siemietkowski et al., *Contract and Fiscal Law Developments of 2001—The Year in Review*, ARMY LAW., Jan./Feb. 2002, at 49 [hereinafter *2001 Year in Review*]. The ADRA had granted the COFC and district courts concurrent jurisdiction over bid protests. See *id.*

3. *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324 (Fed. Cir. 2001); see 5 U.S.C. § 706 (2000).

4. See *Impresa*, 238 F.3d at 1331-32. The latter standard of review is derived from the APA and is the same as that previously applied in the district courts under the *Scanwell* line of cases. See *id.* The COFC (and its predecessor court) used the former standard of review under its grant of jurisdiction pursuant to the Tucker Act. See 28 U.S.C. § 1491(b)(1), (b)(4). Consistent with the APA standard of review, the CAFC ordered a deposition of the contracting officer in order to place "the basis for the contracting officer's responsibility determination" on the record. *Impresa*, 238 F.3d at 1339; see also *supra* Part II(G) (discussing the effect of the CAFC's holding on a contracting officer's responsibility determination).

5. 52 Fed. Cl. 115 (2002).

6. *Lion Raisins, Inc. v. United States*, 51 Fed. Cl. 238 (2001); see *supra* Part IV.Q (discussing the facts and circumstances of the suspension).

7. *Lion Raisins*, 52 Fed. Cl. at 118.

8. *Id.* (referring to 28 U.S.C. § 1491(a)(1)).

9. See 28 U.S.C. § 1491(b).

10. *Lion Raisins*, 52 Fed. Cl. at 119. The COFC later denied the plaintiff's bid preparation and protest costs. See *Lion Raisins, Inc. v. United States*, 52 Fed. Cl. 629 (2002). The court found that the plaintiff's costs related to the size protest with the SBA and the investigation for a certificate of competency "cannot be characterized as bid protest costs." *Id.* at 632.

11. See 28 U.S.C. § 1491(b).

12. 51 Fed. Cl. 362 (2002).

13. *Id.* at 363.

tory, the COFC held that its Tucker Act jurisdiction was limited to “agency” decisions and that it could not intrude upon the GAO’s bid protest jurisdiction.¹⁵ The COFC refused to extend its jurisdiction any further than the plain language of the statute allowed and dismissed the lawsuit.¹⁶

GAO’s Jurisdictional Wings Grow Shorter

The GAO, like the COFC, also clipped its own jurisdictional wings in a number of cases. In *Shinwha Electronics*,¹⁷ the GAO announced that it would “no longer review, even under a limited standard, protests that an agency improperly suspended or debarred a contractor from receiving government contracts.”¹⁸ In the past, the GAO “generally declined to review protests of suspension or debarment decisions,” but retained jurisdiction over protests alleging an improper suspension or debarment imposed “during the pendency of a procurement in which it was competing.”¹⁹ The Army notified Shinwha of its suspension from government contracting pending completion of a criminal

fraud investigation.²⁰ Although the GAO denied the protest under the standard of review imposed in prior suspension-debarment cases,²¹ it stated that it would no longer review such cases “[b]ecause the FAR sets forth specific procedures for both imposing and challenging a suspension or debarment action . . . the appropriate forum for resolving such disputes is with the contracting agency.”²²

The jurisdiction noose grew even tighter in *Champion Business Services, Inc.*,²³ when the GAO dismissed a protest alleging that the Defense Information Systems Agency, Defense Information Technology Contracting Organization (DISA/DITCO) acted improperly by retaining Champion’s proposal in the competitive range and inviting it to make an oral presentation. Champion alleged that the evaluation results prove that it had no chance for award.²⁴ The GAO held that the claim of an improper invitation to make an oral presentation did not come within the scope of its bid protest jurisdiction under the Competition in Contracting Act (CICA).²⁵

14. *Id.* The COFC has jurisdiction to render judgment in an action involving “any alleged violation of statute or regulation.” 28 U.S.C. § 1491(b)(1) (emphasis added).

15. *Advance Constr.*, 51 Fed. Cl. at 365-66 (quoting Sen. Carl Levin (D-Mich.) as stating that “these provisions addressing federal court jurisdiction over procurement protests would not affect the authority of the Comptroller General to review procurement protests”).

16. *Id.* at 366; *see also* *Davis/HRGM Joint Venture v. United States*, 50 Fed. Cl. 539 (2001) (holding that the COFC did not have the jurisdiction to review a termination for convenience claim when the agency terminated a contract with an awardee after it discovered a defect in the bid bond submitted with the bid).

17. Comp. Gen. B-290603, B-290603.2, Sept. 3, 2002, 2002 CPD ¶ 154.

18. *Id.* at 5.

19. *Id.* at 4.

20. *See supra* Part IV.Q (discussing the fraud issues in *Shinwha*).

21. *Shinwha*, 2002 CPD ¶ 154, at 4. Under the previous standard of review, the GAO would review the matter “to ensure that the agency has not acted arbitrarily to avoid making an award to an offeror otherwise entitled to an award, and also to ensure that minimum standards of due process have been met.” *Id.*

22. *Id.* at 5 (referring to FAR sections 9.406-3(b) and 9.407-3(b), which make the contract agency the appropriate forum for resolving such dispute).

23. Comp. Gen. B-290556, June 25, 2002, 2002 CPD ¶ 130.

24. *Id.* at 2. The agency made four awards out of the thirty-five offerors who made oral presentations. Champion’s proposal was rated thirty-fifth out of thirty-five. *Id.*

25. *See* 31 U.S.C. §§ 3551-3556 (2000); 4 C.F.R. pt. 21 (2002). Specifically, the CICA grants the GAO bid protest jurisdiction over the following types of protests:

challenges to a solicitation or other request by a federal agency for offers for a contract for the procurement of property or services; the cancellation of such a solicitation or other request; an award or proposed award of such a contract; or a termination of such a contract, if the protest alleges that the termination was based on improprieties in the award of a contract.

31 U.S.C. §§ 3551(1), 3552; *see* 4 C.F.R. § 21.1(a).

The GAO will occasionally direct a protestor to the proper forum when it does not have jurisdiction. In *Military Agency Services Pty., Ltd.*,²⁶ a protestor alleged that four separate orders for picket boat services in Singapore Harbor under a blanket purchase agreement breached the protestor's requirements contract for "ship husbanding services," which included a provision for picket boat services.²⁷ The GAO dismissed this part of the protest, reasoning that the allegation was a matter of contract administration for review "by a cognizant board of contract appeals or the Court of Federal Claims" under the Contract Disputes Act of 1978.²⁸

But Then, Sometimes We'll Review Them by Default

The GAO will sometimes review a protest, even if it suspects that Congress may have intended that it be reviewed elsewhere. In *Resource Consultants, Inc.*,²⁹ the GAO held that the authorizing legislation in the Aviation and Transportation Act (ATSA)³⁰ specifically exempted the Transportation Security Administration's (TSA) acquisitions of "equipment, supplies and materials" but not services.³¹ The GAO did recognize, however, that the legislative history of the ATSA implies that Congress may have intended to include services in the exemption.³² The implication did not deter the GAO, which concluded that it would hear protests of TSA's acquisitions of

services "[u]nless the Congress changes the statutory language."³³

*And Sometimes We Just Don't Feel Like Making Any
"Concessions"*

One of the GAO's more interesting decisions was *Starfleet Marine Transportation, Inc.*³⁴ This protest involved the National Park Service's (NPS) decision to cancel a prospectus seeking proposals for ferry services to tourists visiting Fort Sumter National Monument. The NPS cancelled the prospectus and awarded to the incumbent contractor when it decided to offer more than one departure point, a service the incumbent had performed for the past forty years.³⁵ The protestor claimed that the decision to cancel the prospectus lacked a rational basis and was the result of congressional interference. The NPS claimed that the GAO did not have jurisdiction over the concession contracts because "they are not procurement of goods and services, but instead essentially involve the 'sale' of a license or permit to operate a business on federally-owned property."³⁶

The GAO disagreed, observing "that certain contracts, including concession contracts, can involve both a sale and a procurement."³⁷ The GAO also rejected any limitations cited in the Senate and House reports³⁸ accompanying the National Park Service Concessions Management Improvement Act of 1998.³⁹

26. Comp. Gen. B-290414, B-290441, B-290468, B-290496, Aug. 1, 2002, 2002 CPD ¶ 130.

27. *Id.* at 1. Picket boats protect ships from waterborne threats by screening incoming watercraft, directing unauthorized watercraft away from the protected vessels, and warning protected vessels of unauthorized watercraft headed in its direction. *Id.* at 1 n.1.

28. *Id.* at 3-4; *see also* 41 U.S.C. §§ 601-613 (2000); *supra* pt. III.I (discussing jurisdiction issues under the Contract Disputes Act).

29. Comp. Gen. B-290163, B-290163.2, June 7, 2002, 2002 CPD ¶ 94.

30. Pub. L. No. 107-71, 115 Stat. 597 (2001).

31. *Res. Consultants*, 2002 CPD ¶ 94, at 5-6. The Federal Aviation Administration's Acquisition Management System (AMS) specifically granted an exemption for the TSA's procurements of equipment, supplies, and materials. 49 U.S.C. § 40110(d) (2000).

32. *Res. Consultants*, 2002 CPD ¶ 94, at 6. The GAO noted that the AMS's statutory authority was "couched in inclusive terms, directing the FAA Administrator to develop and implement an acquisition management system that addresses the unique needs of the agency." *Id.* In contrast, the ATSA's language specifically limited the applicability of the AMS to TSA's acquisitions of "equipment, supplies, and materials." *Id.*

33. *Id.* The GAO found no such incongruity in *LBM, Inc.*, Comp. Gen. B-290682, Sept. 15, 2002, 2002 CPD ¶ 157. In *LBM*, the GAO rejected the Army's challenge to a protest concerning the proposed issuance of a task order that was previously set aside for small businesses. The Army contended that protests were "not authorized in connection with the issuance or proposed issuance of a task or delivery order except for a protest on the ground that the order increases the scope, period, or maximum value of the contract under which the order is issued." *Id.* at 4 (citing 10 U.S.C. § 2304c(d) (2000)). The GAO disagreed, citing the legislative history of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, 108 Stat. 3243, 3253, and concluding that "nothing in the statute authorizes the transfer of acquisitions to ID/IQ contracts in violation of those laws and regulations." *LBM, Inc.*, 2002 CPD ¶ 157, at 5.

34. Comp. Gen. B-290181, July 5, 2002, 2002 CPD ¶ 113.

35. *Id.* at 2.

36. *Id.* at 5. The protestor also alleged that extending the incumbent's contract violated the CICA. *Id.*

37. *Id.* at 6.

38. *Id.* at 3. The Senate and House reports "expressed the view that concession 'contracts do not constitute contracts for the procurement of goods and services for the benefit of the government or otherwise.'" *Id.* at 5 (quoting S. 202, 105th Cong. (1998); H.R. 767, 105th Cong. (1998)).

Finally, the GAO declined to extend the holding in a D.C. Circuit case that characterized the government's receipt of "incidental benefits from a concessioner's performance" as insufficient to give rise to a procurement contract.⁴⁰ Instead, the GAO took a broader approach to mixed transactions that include "concession" and "services" elements in order to determine if the services were "de minimis" when compared to the concessions provided.⁴¹ The GAO ultimately held that the cancellation was reasonable and denied the protest.⁴² The decision may offer only temporary solace for those annoyed with the GAO's intrusion into the concession world, especially when the "service" elements of the prospectus were largely for the benefit of the visitors, not for the government.⁴³

*COFC Not "Interested" That Boot Manufacturer Had
"Standing" at GAO*

Last year's *Year in Review* discussed a case where a protestor claimed that it was an "interested party," even though it did not actually submit a proposal.⁴⁴ In *McRae Industries, Inc.*,⁴⁵ the protestor alleged that it would have submitted a proposal but for tests included in the solicitation that the contracting officer later waived.⁴⁶ Although the GAO denied the protest, it did hold that the protestor was an interested party based on its assertion that it would have submitted a proposal under the relaxed requirements.⁴⁷ McRae then filed suit in the COFC to enjoin award of the contracts.⁴⁸ The COFC, however, was not as generous in granting the protestor interested party

status. Instead, it held that McRae was a "prospective" rather than "actual" bidder, citing an earlier case

that reasoned that the use of the word "prospective" indicated that, "in order to be eligible to protest, one who has not actually submitted an offer must be *expecting* to submit an offer prior to the closing date of the solicitation . . . the opportunity to qualify either as an actual or a prospective bidder ends when the proposal period ends."⁴⁹

McRae did not submit a bid or protest the request for proposal before the close of bidding. Therefore, McRae was neither a prospective bidder nor had standing and COFC affirmed the earlier dismissal.⁵⁰

Is the Contractor Standing also Responsible?

In *Myers Investigative & Security Services v. United States*,⁵¹ the COFC held that a protestor had standing as an interested party when an agency refused its bid submission on a sole-source solicitation. The COFC concluded, however, that the protestor failed to prove prejudice by the agency's sole-source decision because the protestor "made no effort to show that it was responsible and could have performed the contracts."⁵² On appeal, the CAFC affirmed the COFC's dismissal, holding that Myers needed to prove that it would have a "substantial

39. 16 U.S.C. § 5951 (2000).

40. *Starfleet Marine Transp., Inc.*, 2002 CPD ¶ 113, at 7 (citing *Amfac Resorts, L.L.C. v. Dep't of Interior*, 282 F.3d 818, 835 (D.C. Cir. 2002)).

41. *Id.* at 8. The GAO decided that in this case, the services were more than de minimis because they included a long list of other service-related tasks that the contractor was required to perform in addition to the ferry service. *Id.*

42. *Id.* at 9.

43. *Id.* at 8. The services included cleaning the visitor center, providing janitorial services for the assigned docks and pier, and providing visitors with an interpretive program that would be heard on a loudspeaker system on each ferry. *Id.*

44. See 2001 *Year in Review*, *supra* note 2, at 52. An "interested" party is defined as "an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract." 31 U.S.C. § 3551(2) (2000); 4 C.F.R. § 21.0(a) (2002).

45. Comp. Gen. B-287609.2, July 20, 2001, 2001 CPD ¶ 127.

46. *Id.* at 1-2. The contracts were for military boots, and the tests were for leakage and toe adhesion requirements of cold, wet boots with removable insulated booties. The GAO agreed with McRae's contention that an opportunity to compete under a revised request for proposal gave McRae a sufficient direct economic interest. *Id.*

47. *Id.* at 5-6. The GAO ultimately denied the protest because although the tests were no longer required, the standard requirements remained a part of the solicitation. Since McRae admittedly could not meet the standard requirements, it did not show the required "prejudice" to have the protest sustained. *Id.*

48. *McRae Indus., Inc. v. United States*, 53 Fed. Cl. 177 (2002). The Defense Logistics Agency awarded two contracts—one to Belleville Shoe Manufacturing Co., and the other to Wolverine World Wide, Inc. Both awardees filed as intervenors in the protest. *Id.* at 178.

49. *Id.* at 180 (quoting *MCI Telecomm. Corp. v. United States*, 878 F.2d 362, 365 (Fed. Cir. 1989)).

50. *Id.* at 180-81.

51. 47 Fed. Cl. 605 (2000).

52. *Id.* at 620.

chance” of receiving the award.⁵³ The CAFC concluded that the facts showed no prejudice in this instance because “Myers, by its own admission, presented no evidence that it was qualified to secure the awards if they had been made the subject of competitive bids.”⁵⁴

Equal Access to Justice Act

Catalyst Theory Lays a Brick

Last year’s *Year in Review* discussed *Brickwood Contractors, Inc. v. United States*,⁵⁵ a COFC case that involved a protestor’s Equal Access to Justice Act (EAJA)⁵⁶ claim. The protestor filed its claim after the Navy took corrective action in response to the protest by canceling its original Invitation for Bids (IFB) and resoliciting under a Request for Proposals (RFP). The trial court’s remarks at a temporary restraining order (TRO) hearing raised questions about the Navy’s resolicitation and prompted the Navy to take corrective action. Brickwood’s EAJA application sought attorney fees and expenses for work it performed on the protest. At that time, the COFC held that Brickwood was a “prevailing party” under the EAJA, and therefore, entitled to protest costs.⁵⁷ The court discussed the term “prevailing party” under the “catalyst theory,” and concluded that a party may be entitled to costs under the EAJA even without findings on the merits.⁵⁸ Instead, it was enough that the suit is a “causal, necessary, or substantial factor in obtaining the result plaintiff sought.”⁵⁹ The court did recognize, however, that “[t]he Supreme Court [had] granted certiorari in a case in which the viability of the catalyst theory is directly at issue.”⁶⁰

The *Brickwood I* court was referring to *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*,⁶¹ a U.S. Supreme Court case that rejected the “catalyst theory”⁶² of prevailing party claims as it applied to two specific statutes— the Fair Housing Amendments Act (FHAA) of 1988⁶³ and the Americans with Disabilities Act (ADA) of 1990.⁶⁴ In *Buckhannon*, the plaintiff, who operated assisted-living care homes, sued in the U.S. District Court for the Northern District of West Virginia, alleging that West Virginia’s “self-preservation” requirements, which forbade the boarding of residents who could not remove themselves from dangerous situations such as fires, violated both the FHAA and the ADA. The district court dismissed the case after legislation deleted the “self-preservation” requirements. The plaintiffs then requested attorney’s fees as the “prevailing party” under the FHAA and the ADA.⁶⁵ The Supreme Court rejected the theory that a party can be “prevailing” because of a defendant’s voluntary change in conduct, instead requiring entitlement based on the merits, either in the trial court or on appeal.⁶⁶

The Navy filed a motion seeking relief from the *Brickwood I* judgment, contending that the Supreme Court’s *Buckhannon* decision invalidated the finding that the plaintiff was a “prevailing party.”⁶⁷ The COFC disagreed, noting that the *Buckhannon* court specifically excluded the EAJA from the breadth of its holding. The COFC also compared the impetus behind the change in circumstances. In *Buckhannon*, the West Virginia legislature resolved the underlying issue independently.⁶⁸ In this case, the Navy took corrective action after hearing the trial court’s serious reservations about its handling of the solicitation.⁶⁹ The COFC compared the “prevailing party” language in the EAJA with that in the FHAA and the ADA and concluded that the FHAA and the ADA allowed the court broad discretion to determine if a plaintiff was a “prevailing party.”⁷⁰ Contrarily,

53. *Myers Investigative & Sec. Servs. v. United States*, 275 F.3d 1366, 1370 (Fed. Cir. 2002).

54. *Id.* at 1371.

55. 49 Fed. Cl. 738 (2001) [hereinafter *Brickwood II*]; see also 2001 *Year in Review*, *supra* note 2, at 52-54 (discussing *Brickwood II* and the COFC’s earlier decision in *Brickwood Contractors, Inc. v. United States*, 49 Fed. Cl. 148 (2001) [hereinafter *Brickwood I*]).

56. 28 U.S.C. § 2412 (2000).

57. *Brickwood I*, 49 Fed. Cl. at 148.

58. *Id.* at 154.

59. *Id.*

60. *Id.* at 154 n.4.

61. 532 U.S. 598 (2001).

62. The Supreme Court described the “catalyst theory” as a situation when the plaintiff is a “prevailing party” for the purposes of obtaining attorney’s fees “because the lawsuit brought about a voluntary change in the defendant’s conduct.” *Id.* at 603.

63. 42 U.S.C. § 3613(c)(2) (2000).

64. 42 U.S.C. § 12205.

65. *Buckhannon*, 532 U.S. at 604.

the EAJA clearly stated that a “prevailing party” was entitled to “fees and other expenses . . . *unless* the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.”⁷¹ Last, the COFC held that the trial court’s comments at the temporary restraining order hearing, which questioned the agency’s handling of the solicitation, “represent[ed] the necessary ‘judicial imprimatur’ that caused the legal relationship of the parties.”⁷²

On appeal, the CAFC offered several reasons for its reversal of the *Brickwood II* court’s holding. First, the CAFC noted that although the *Buckhannon* court considered only the fee-shifting provisions in the FHAA and ADA, the “analysis applied . . . to numerous statutes in addition to those at issue here.”⁷³ The CAFC agreed that “there are certain differences between the EAJA and other fee-shifting statutes.”⁷⁴ The court added that Congress chose the same term, “prevailing party,” in the EAJA as it did in other fee-shifting statutes, stating that “[t]here is no reason to assume this term has a different meaning under the EAJA.”⁷⁵ The court noted that under the EAJA, courts “shall” award reasonable attorney’s fees absent substantial justification for the government’s position, “whereas under the FHAA and ADA the court ‘may’ award fees.”⁷⁶ The CAFC examined the text and history of the EAJA, which it concluded illustrated Congress’s intent to use the term “prevailing party” consistently among all the fee-shifting statutes.⁷⁷ Last, the CAFC

described the trial court’s “very preliminary” remarks at the TRO as “not constitut[ing] a ‘court-ordered change in the legal relationships of the parties as *Buckhannon* requires.’”⁷⁸

GAO Not Jumping on the Buckhannon Bandwagon

Successful protestors at the GAO may enjoy a higher reimbursement success rate than elsewhere. In *Georgia Power Co.*,⁷⁹ the agency took corrective action twelve days after the protestors filed their comments and two days after a teleconference between the GAO and the parties.⁸⁰ At the protestors’ request, the GAO recommended the reimbursement of protest costs. The agency argued that *Buckhannon* precludes the GAO from awarding protest costs where agency action results in the dismissal of the protest.⁸¹ The GAO disagreed, seizing on the Supreme Court’s characterization of “prevailing party” as a “term of art” not present in CICA.⁸² The GAO concluded that the CICA limits its authority to recommend reimbursement of an “appropriate interested party” and that “there is nothing in the express language of CICA that compels the conclusion that to be an ‘appropriate interested party’ requires a ‘judicially-mandated change in the relationship of the parties.’”⁸³

66. *Id.* at 615.

67. *Brickwood II*, 49 Fed. Cl. 738, 740 (2001).

68. *Id.* at 744.

69. *Id.* at 748-49.

70. *Id.* at 745.

71. *Id.* at 746.

72. *Id.* at 749.

73. *Brickwood Contractors, Inc., v. United States*, 288 F.3d 1371, 1377 (Fed. Cir. 2002) [hereinafter *Brickwood III*] (citing *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 602 (2001)).

74. *Id.* at 1378.

75. *Id.* at 1378-79 (citing *Perez-Arellano v. Smith*, 279 F.3d 791, 795 n.20 (9th Cir. 2002)).

76. *Id.* at 1378 (citing *Perez-Arellano*, 279 F.3d at 795).

77. *Id.* at 1379 (quoting H.R. 1418, 96th Cong. (1980) (“It is the committee’s intention that the interpretation of the term [prevailing party] be consistent with the law that has developed under existing statutes.”)).

78. *Id.* at 1380 (quoting *Buckhannon*, 532 U.S. at 608).

79. Comp. Gen. B-289211.5, B-289211.6, May 2, 2002, 2002 CPD ¶ 81.

80. *Id.* at 4. At the teleconference, the GAO advised the agency that it did not find any past performance documentation that was required under the RFP. *Id.*

81. *Id.* at 10-11.

82. *Id.* at 11 (citing *Buckhannon*, 532 U.S. at 603).

The GAO's regulations allow a successful offeror reimbursement of the costs of filing and pursuing a protest, in addition to the costs of preparing a proposal.⁸⁴ Of course, the GAO may deny protest costs if an agency takes prompt corrective action.⁸⁵ The GAO may also decide to award protest costs "where the contracting agency unduly delayed taking corrective action in response to a clearly meritorious protest," and "corrective action was taken only after the protestor filed comments on the agency report and after GAO expressed concerns regarding the lack of adequate documentation."⁸⁶ In any case, the successful protestor should request an amount that has some basis in reality. In *Galen Medical Associates, Inc.*,⁸⁷ the GAO found that basis lacking, quantifying the protestor's claim as equaling \$7154 per page of its twenty-two pages of submissions to GAO.⁸⁸ The GAO recommended that the agency reimburse the protestor a whopping \$110.65 out of the \$159,195.32 claim.⁸⁹

GAO Proposes to Amend Bid Protest Regulations

The GAO recently issued a proposed rule designed to revise and update several of its bid protest regulations. One proposed change is to clarify "that protests and other documents may be filed by facsimile" and that subject to protective orders, "all filings, including protests, may be filed by other electronic means, such as electronic mail (E-mail)."⁹⁰ Another revision clarifies that the GAO's Alternate Dispute Resolution (ADR) program

includes both "outcome prediction and negotiation assistance," and states that "ADR is among the flexible alternative procedures GAO may use to promptly and fairly resolve a dispute."⁹¹ The GAO also proposes to delete language in the regulations that suggests that it may decide protests on the record without protestors' comments, and also clarify that only the GAO may grant an extension of the ten days to file the protestor's comments.⁹²

In an effort to make the Small Business Certificate of Competency (COC) Program consistent with affirmative determinations of responsibility under the Section 8(a) program, the GAO proposes creating an "SBA's failure to follow its own regulations" exception to the general rule that the GAO will not review protests in this area.⁹³ The GAO also proposes deleting language that specifically prohibits separate comments on the agency report if it will also hold a hearing. The timeliness rules regarding claims for protest costs would change from "[fifteen] days after the protestor is advised that the contracting agency has decided to take corrective action" to "[fifteen] days from the time the protestor learned or (should have learned) that GAO has closed the protest in response to a corrective action."⁹⁴ Another proposed revision clarifies that "any case—not only bid protests—will be dismissed where the matter involved is the subject of litigation, or has been decided on the merits."⁹⁵

Two of the proposed changes involve cases reported earlier in this section. One of the changes reflects the GAO's holding in *Shinwha Electronic, Inc.*,⁹⁶ that it would no longer review suspension and debarment actions.⁹⁷ The other change expands

83. *Georgia Power Co.*, 2002 CPD ¶ 81, at 11-12. In addition to rejecting *Buckhannon's* applicability to its authority to recommend protest costs, the GAO also rejected the agency's contention that it had no authority to recommend reimbursement of protest costs. Although the CICA required a violation of a statute or regulation to entitle a plaintiff to compensation for its costs, GAO regulations did not. *Id.* at 7-8. The GAO disagreed, stating that its rules implemented the authority provided in the CICA "[i]f the contracting agency decides to take corrective action in response to a protest." *Id.* at 8 (citing 4 C.F.R. § 21.8(e) (2002)).

84. See 4 C.F.R. § 21.8(d).

85. See, e.g., *Mapp Bldg. Servs.—Costs*, Comp. Gen. B-289160, Mar. 13, 2002, 2002 CPD ¶ 60 (denying protest costs where the agency agreed to take corrective action before the protest report was due and no basis exists to find that the agency did not promptly implement the promised corrective action).

86. *Alaska Mech., Inc.—Costs*, Comp. Gen. B-289139.2, Mar. 6, 2002, 2002 CPD ¶ 56, at 1.

87. *Comp. Gen. B-288661.6*, July 22, 2002, 2002 CPD ¶ 114.

88. *Id.* at 3.

89. *Id.* at 8.

90. 67 Fed. Reg. 190 at 61,542 (proposed Oct. 1, 2002) (to be codified at 4 C.F.R. pt. 21).

91. *Id.*

92. *Id.* at 61,543.

93. *Id.* The present rule allows a GAO COC determination review only if there is a showing of bad faith by government officials. 4 C.F.R. § 21.5(b)(2).

94. *Id.*

95. *Id.* at 61,543-44.

96. *Comp. Gen. B-290603*, B-290603.2, Sept. 3, 2002, 2002 CPD ¶ 154.

the GAO's review of affirmative determinations of responsibility, consistent with the holding in *Impresa Construzioni Geom. Domenico Garufi v. United States*.⁹⁸ Under the rule change, the review could include protests where the evidence raises serious concerns as to whether the contracting officer unreasonably failed to consider available relevant information, or otherwise violated statute or regulation.⁹⁹

GAO Bid Protest Docket Up; Decision on Merits and Sustain Rate Down

The number of bid protests filed at the GAO during fiscal year (FY) 2002 increased for the first time in over a decade.

The GAO's statistics, however, show that it heard and sustained fewer protests. The total number of bid protests filed at the GAO rose from 1146 in FY 2001 to 1204 in FY 2002.¹⁰⁰ The increase in filings did not translate into more favorable results for protestors. The GAO issued fewer decisions on the merits, from 311 in FY 2001 to 256 in FY 2002. The GAO protest-sustain rate decreased five percent, from twenty-one percent in FY 2001 (sixty-six sustains), to sixteen percent in FY 2002 (forty-one sustains). The number of ADR proceedings also decreased. Although the number of ADR hearings significantly decreased, the ADR success rate held constant at eighty-four percent.¹⁰¹ The COFC's FY 2002 bid protest statistics were unavailable as of January 2003.¹⁰² Major Modeszto.

97. 67 Fed. Reg. at 61,543.

98. 238 F.3d 1324 (Fed. Cir. 2001).

99. 67 Fed. Reg. at 61,543.

100. See *Bid Protests: GAO Protest Docket Up 5% in FY 2002; Sustain Rate Down 5% to 16%*, 78 BNA FED. CONT. REP. 16, at 485 (Oct. 29, 2002).

101. *Id.* For those protests that the GAO heard on the merits, it issued decisions in an average of seventy-nine days. *Id.*

102. United States Court of Federal Claims, *Announcements* (Jan. 10, 2003), at <http://www.uscfc.uscourts.gov/announce.htm>.